DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-414
Title: Sherry L. Burt, Warden, Petitioner
v.
Vonlee Nicole Titlow
Docketed: October 4, 2012
Linked with 12A166
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (10-2488)
Decision Date: May 22, 2012
Rehearing Denied: August 2, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Aug 15 2012	Application (12A166) for a stay pending the filing and disposition of a petition for a writ of certiorari, submitted to Justice Kagan.
Aug 22 2012	Response to application (12A166) requested by Justice Kagan, due Thursday, August 30, 2012, by 4 p.m. EDT.
Aug 29 2012	Response to application from respondent Vonlee Nicole Titlow filed.
Sep 7 2012	Application (12A166) denied by Justice Kagan.
Oct 2 2012	Petition for a writ of certiorari filed. (Response due November 5, 2012)
Oct 23 2012	Brief of respondent Vonlee Nicole Titlow in opposition filed.
Oct 23 2012	Motion for leave to proceed in forma pauperis filed by respondent Vonlee Nicole Titlow.
Nov 5 2012	DISTRIBUTED for Conference of November 20, 2012.
Nov 5 2012	Brief amici curiae of Connecticut and 18 Other States filed. (Distributed)
Nov 9 2012	Reply of petitioner Sherry L. Burt, Warden filed. (Distributed)
Nov 16 2012	Record Requested .
Nov 21 2012	Record received from the U.S. Court of Appeals for the Sixth Circuit (Electronic).
Nov 23 2012	Record received from the U.S. District Court for the Eastern District of Michigan (CD format).
Nov 28 2012	DISTRIBUTED for Conference of January 4, 2013.
Jan 7 2013	DISTRIBUTED for Conference of January 11, 2013.
Jan 14 2013	DISTRIBUTED for Conference of January 18, 2013.
Feb 4 2013	DISTRIBUTED for Conference of February 15, 2013.
Feb 19 2013	DISTRIBUTED for Conference of February 22, 2013.

Feb 25 2013	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Feb 25 2013	Petition GRANTED.
Mar 11 2013	Motion to appoint counsel filed by respondent Vonlee Nicole Titlow.
Apr 4 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 10, 2013.
Apr 10 2013	Motion DISTRIBUTED for Conference of April 26, 2013.
Apr 29 2013	Motion to appoint counsel filed by respondent GRANTED. Valerie Newman, of Detroit, Michigan, is appointed to serve as counsel for the respondent in this case.
Jun 10 2013	Joint appendix filed. (Statement of costs filed)
Jun 10 2013	Brief of petitioner Sherry L. Burt, Warden filed.
Jun 17 2013	Brief amicus curiae of United States filed.
Jun 17 2013	Brief amici curiae of Connecticut and 34 Other States filed.
Jul 8 2013	The time to file respondent's brief on the merits is further extended to and including July 17, 2013.
Jul 8 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jul 17 2013	Brief of respondent Vonlee Nicole Titlow filed.
Jul 17 2013	Consent to the filing of amicus curiae briefs from either party or neither party received from counsel for the respondent.
Jul 22 2013	CIRCULATED.
Jul 23 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 23 2013	SET FOR ARGUMENT on Tuesday, October 8, 2013.
Jul 24 2013	Brief amicus curiae of Constitution Project filed. (Distributed)
Jul 24 2013	Brief amicus curiae of The Ethics Bureau at Yale filed. (Distributed)
Jul 24 2013	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Jul 24 2013	Brief amicus curiae of Center on the Administration of Criminal Law, New York University School of Law filed. (Distributed)
Jul 26 2013	Proposal of counsel for petitioner to lodge copies of the official transcripts and opinion from Vonlee Titlow v. Frederick Toca, et al. (Oakland County Circuit Court No. 3-054451-CZ).
Aug 2 2013	Record from U.S.C.A. for 6th Circuit is electronic
Aug 13 2013	Opposition of respondent to petitioner's lodging proposal.
Aug 16 2013	Reply of petitioner Sherry L. Burt, Warden filed. (Distributed)
Aug 30 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 8 2013	Argued. For petitioner: John J. Bursch, Solicitor General, Lansing, Mich.; and Ann O'Connell, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Valerie R. Newman, Assistant Defender, Detroit, Mich.
Oct 11 2013	Electronic record received from Court of Appeals of Michigan.
Nov 5 2013	Judgment REVERSED Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, Thomas, Breyer, Sotomayor, and Kagan, JJ., joined. Sotomayor, J., filed a concurring opinion. Ginsburg, J., filed an

opinion concurring in the judgment.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

12 414

Supreme Court, U.S.
FILED
OCT 2 - 2012
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

SHERRY L. BURT, PETITIONER

v.

VONLEE TITLOW

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Laura Moody
Appellate Division Chief

Raina Korbakis
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

Library of Congress
Law Library

QUESTIONS PRESENTED

This case presents three questions involving AEDPA (the Antiterrorism and Effective Death Penalty Act of 1996), and *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), this Court's recent decision expanding ineffective-assistance-of-counsel claims to include rejected plea offers:

1. Whether the Sixth Circuit failed to give appropriate deference to a Michigan state court under AEDPA in holding that defense counsel was constitutionally ineffective for allowing Respondent to maintain his claim of innocence.

2. Whether a convicted defendant's subjective testimony that he would have accepted a plea but for ineffective assistance, is, standing alone, sufficient to demonstrate a reasonable probability that defendant would have accepted the plea.

3. Whether *Lafler* always requires a state trial court to resentence a defendant who shows a reasonable probability that he would have accepted a plea offer but for ineffective assistance, and to do so in such a way as to "remedy" the violation of the defendant's constitutional right.

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the opinion. The Petitioner is Sherry Burt, Warden of a Michigan correctional facility. The Respondent is Vonlee Titlow, an inmate.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES vi
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 2
INTRODUCTION 3
STATEMENT OF THE CASE 4
A. Donald Rogers' murder 4
B. Titlow first accepts, then withdraws, a plea bargain 5
C. State court proceedings 7
D. Federal habeas corpus proceedings 7
REASONS FOR GRANTING THE PETITION 10
I. It is not ineffective assistance for an attorney to honor his client's desire to maintain innocence. 10
II. There is a mature circuit conflict regarding the evidence needed to support a defendant's claim that he would have accepted a plea but for counsel's deficient advice. 14
III. *Lafler* does not require a state trial court to resentence or to remedy the purported constitutional violation. 17
CONCLUSION 20

PETITION APPENDIX TABLE OF CONTENTS

United States Court of Appeals
For the Sixth Circuit
Opinion
Issued May 22, 2012 ..... 1a-32a

United States Court of Appeals
For the Sixth Circuit
Judgment
Issued May 22, 2012 ..... 33a

United States District Court –
Eastern District of Michigan
Opinion and Order Denying Petition
Issued October 19, 2010 ..... 34a-97a

Michigan Court of Appeals
Order Affirming Conviction
Issued December 11, 2003 ..... 98a-119a

Michigan Supreme Court
Order
Issued May 28, 2004 ..... 120a

United States Court of Appeals
For the Sixth Circuit
Order Denying Petition for En Banc Rehearing
Issued August 2, 2012 ..... 121a

United States Court of Appeals
For the Sixth Circuit
Order Denying Request to Stay Mandate
Issued August 8, 2012 ..... 122a

United States Court of Appeals
For the Sixth Circuit
Mandate
Issued August 10, 2012 ..... 123a

TABLE OF AUTHORITIES

Page

Cases

Bachicha v. *Shanks*,
66 F.3d 338, 1995 WL 539467 (10th Cir. Aug. 31, 1995) 16

Cooper v. *Lafler*,
376 Fed. Appx. 563 (6th Cir. 2010) 16

Diaz v. *United States*,
930 F.2d 832 (11th Cir. 1991) 16

Florida v. *Nixon*,
543 U.S. 175 (2004) 3, 11

Griffin v. *United States*,
330 F.3d 733 (6th Cir. 2003) 15

Harrington v. *Richter*,
131 S. Ct. 770 (2011) 10, 13

Lafler v. *Cooper*,
132 S. Ct. 1376 (2012) ..... passim

Maldonato v. *Archuleta*,
61 Fed. App'x 524, 2003 WL 361303 (10th Cir. Feb. 20, 2003) 16

Moses v. *United States*,
175 F.3d 1025, 1999 WL 195675 (8th Cir. 1999) 16

North Carolina v. *Alford*,
400 U.S. 25 (1970) 15

Paters v. *United States*,
159 F.3d 1043 (7th Cir. 1998) 16

People v. *Grove*,
455 Mich. 439; 566 N.W.2d 547 (1997) 19

Smith v. *United States*,
348 F.3d 545 (6th Cir. 2003) 3, 15

Strickland v. *Washington*,
466 U.S. 668 (1984) 7, 13, 14

Toro v. *Fairman*,
940 F.2d 1065 (7th Cir. 1991) 16

United States v. *Gordon*,
156 F.3d 376 (2d Cir. 1998) 16

United States v. *Morris*,
106 Fed. App'x 656, 2004 WL 1598792 (10th Cir. July 19, 2004) 16

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2241 *et seq* ..... passim

28 U.S.C. § 2254(d)(1) 10, 11

28 U.S.C. § 2254(d)(2) 10, 11, 12

Rules

ABA Model Rules of Prof'l Conduct R. 1.2(a) 11

Mich. Ct. Rule 6.302(C)(3) 19

Mich. Rules of Prof'l Conduct R. 1.2(a) 11

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals, App. 1a–32a, is reported at 680 F.3d 577. The opinion of the District Court, App. 34a–97a, is not reported but is available at 2010 WL 4115410. The opinion of the Michigan Court of Appeals, App. 98a–119a, is not reported but is available at 2003 WL 22928815.

JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on May 22, 2012. App. 33a. A petition for rehearing was denied on August 2, 2012. App. 121a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 *et seq.*), provides in § 2254:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

INTRODUCTION

This is an appeal of a Sixth Circuit habeas decision holding that trial counsel is constitutionally ineffective for honoring a client's desire to maintain his innocence.

A jury convicted Respondent Vonlee Titlow of second-degree murder. Titlow now says that his trial counsel was ineffective for allowing Titlow to withdraw a manslaughter plea and maintain his innocence, despite the fact that Titlow hired his trial counsel to do just that. A Sixth Circuit panel majority held that the Michigan Court of Appeals unreasonably denied Titlow's ineffective-assistance claim. Accordingly, the panel majority ordered the state to reoffer the plea Titlow had previously accepted and withdrawn. That decision raises three issues warranting review.

The first issue is whether the Sixth Circuit gave appropriate AEDPA deference to the state-court decision. The state court's factual findings were not objectively unreasonable, and its holding was consistent with this Court's admonition that the defendant retains "the ultimate authority" whether to plead guilty. *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004).

The second issue is whether a defendant can satisfy the prejudice component of an ineffective-assistance claim based solely on his own, post-conviction testimony that he would have accepted a plea offer but for counsel's deficient advice. The Sixth Circuit again says yes. *Smith* v. *United States*, 348 F.3d 545, 551 (6th Cir. 2003). But at least five other circuits require some objective evidence that the defendant would have accepted the plea. This Court should grant the petition and resolve the circuit split.

The third issue involves the proper remedy under *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), when a defendant claims that deficient advice led him to reject a favorable plea offer. The Sixth Circuit panel majority here ordered the state trial court on remand to fashion a sentence that remedies the violation of Titlow's right to effective assistance. But as Sixth Circuit Chief Judge Batchelder explained in dissent, *Lafler* does not require the state trial court to resentence; the remedy is the government's reoffering of the original plea agreement, not a new sentence.

For all of these reasons, certiorari is warranted.

STATEMENT OF THE CASE

A. Donald Rogers' murder

Vonlee Titlow's conviction stemmed from his role in the murder by smothering of Titlow's elderly, wealthy uncle, Donald Rogers. Titlow agreed to help his aunt, Billie Rogers, kill Donald so that Billie could inherit Donald's large estate. Titlow, a transgender male, planned to use some of the money he earned from this plot to pay for a sex-change operation. Following Donald's murder, Billie purchased new cars for herself and Titlow. Billie also wrote Titlow a check for over $70,000 and gave him additional money for gambling. Titlow did not carry out the sex-change operation before his arrest.[1]

---

[1] Titlow is a transgender person who is housed in an all-male prison facility. The lower court opinions use a combination of male and female pronouns when referring to Titlow, but for consistency, this Petition will use male pronouns.

Danny Chahine befriended Titlow in June 2000 when Titlow was living with Donald and Billie. On August 12, 2000, Titlow called Chahine and told him that Donald had been found dead on the kitchen floor. Chahine was immediately suspicious, because Titlow had previously talked about Billie's desire to pay for her husband's murder after he objected to Billie incurring credit card debt to gamble. When Chahine asked Titlow if he or his aunt had done something to Donald, Titlow said he would explain everything later.

Titlow later confided that he had helped kill Donald. Thereafter, Chahine secretly wore a wire and elicited incriminating statements from Titlow. Based on this and other evidence, the state charged Titlow and Billie with first-degree premeditated murder.

B. Titlow first accepts, then withdraws, a plea bargain

Titlow initially pled guilty to manslaughter with a sentence agreement of 7-to-15 years. In exchange, Titlow would testify against Billie and not appeal his conviction or sentence. During his plea, Titlow confirmed that he and his then-attorney, Richard Lustig,[2] had "gone over all of the evidence together

---

[2] Titlow was represented by three attorneys in succession. His first retained attorney, Richard Lustig, negotiated and recommended the plea agreement. Titlow later discharged Lustig and enlisted attorney Frederick Toca to move for Titlow's plea withdrawal. Toca later withdrew as counsel based on Titlow's inability to pay for the Billie Rogers trial transcript. In granting Toca's motion to withdraw as counsel, the trial court learned that Titlow had agreed to pay Toca jewelry and to assign Toca a "book deal." App. 100a. That fact is irrelevant to this appeal. Williams Cataldo, a court-appointed attorney, represented Titlow at trial.

over a long period of time," and that Lustig had advised him about the elements necessary for the prosecution to secure a conviction. Titlow said he understood that "although he didn't participate in what appear[ed] to be a smothering," a jury could find him guilty of first-degree murder, second-degree murder, manslaughter, or nothing at all. Titlow was satisfied with Lustig's advice, and the state trial court accepted Titlow's plea.

Before sentencing, Titlow spoke with a sheriff's deputy at the jail, maintaining his innocence. The deputy suggested that Titlow not plead guilty if he was innocent of Donald's murder and suggested that Titlow talk to another attorney. He put Titlow in touch with an attorney, who, in turn, recommended that Titlow speak with another attorney, Frederick Toca.

Titlow then discharged his first attorney, Lustig, and enlisted Toca as new counsel for the purpose of withdrawing the guilty plea. Three days later, Toca moved to withdraw Titlow's plea. At the hearing, Titlow acknowledged that he "fully under[stood] the consequences" of withdrawing his plea to manslaughter, and that withdrawing the plea would reinstate the first-degree murder charge and subject him to a potential life sentence. Titlow affirmed he was withdrawing his plea "freely and voluntarily." The trial court granted the motion. The state then proceeded to try Billie without Titlow's testimony and was unable to obtain a conviction. Billie died several months later.

Titlow's gamble did not pay off. A jury convicted him of second-degree murder, and he was sentenced to 20-to-40 years. Titlow then accused Toca of being ineffective for allowing Titlow to withdraw the plea.

C. State court proceedings

The state trial court rejected Titlow's ineffective-assistance claim, and the Michigan Court of Appeals affirmed. "When a defendant proclaims his innocence, . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty – no matter how 'good' the deal may appear." App. 102a. "On the proofs and arguments offered by defendant, defendant has failed to demonstrate that his second attorney's advice to withdraw his plea fell below an objective standard of reasonableness." App. 102a.

D. Federal habeas corpus proceedings

The District Court denied Titlow habeas relief, because Titlow could not satisfy AEDPA's exacting standard for setting aside a state-court conviction: Titlow "has not shown that the Michigan Court of Appeals's decision regarding this claim is contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court or an unreasonable determination of the facts." App. 62a. Specifically, Titlow could not prevail on the deficient-performance component of his ineffective-assistance claim. See *Strickland* v. *Washington*, 466 U.S. 668 (1984). First, Titlow's "desire to withdraw her plea (which itself was motivated by a belief in innocence) pre-dated interim counsel's involvement." App. 64a. Second, "how can a criminal defendant's counsel be ineffective for advising her to go to trial when she (the criminal defendant) claims to be innocent of the crime?" App. 64a–65a.

A Sixth Circuit panel majority then granted Titlow habeas relief. The panel majority first held that the

Michigan Court of Appeals had unreasonably determined the facts when it concluded that Toca's advice was based on Titlow's proclamations of innocence. App. 18a–19a. The majority opined that "the record contain[ed] no evidence" that Titlow's new attorney fulfilled his obligation to provide sufficient advice to Titlow. App. 19a. In particular, because the new attorney relied on Titlow's protestations of innocence and did not pick up discovery materials from or discuss the case with Titlow's previous attorney until after Titlow's plea withdrawal, the majority assumed that the new attorney could not adequately advise Titlow on his sentencing exposure or the reasonableness of the plea offer and therefore provided deficient performance. App. 19a–20a. The majority also held that Titlow established prejudice based on the fact that Titlow accepted the plea before he withdrew it, the sentencing disparity, and Titlow's subjective testimony that he would not have withdrawn his plea but for counsel's ineffective advice. App. 22a.

The panel majority directed the state to reoffer Titlow the original plea agreement, App. 25a, even though the state had already lost the major benefit of the bargain: Titlow's testimony. The majority also ordered the state trial court to fashion a sentence on remand that "remedied" the violation of Titlow's right to effective assistance. *Id.*

Sixth Circuit Chief Judge Batchelder rejected each of these holdings. First, the panel majority failed to give appropriate AEDPA deference to the Michigan Court of Appeals' factual findings. The "record does not establish that [trial counsel]'s advice was the decisive factor in Titlow's decision to withdraw her plea." App.

26a (Batchelder, J., dissenting). Rather, the "record shows that Titlow wanted to withdraw her plea before she ever enlisted [her new attorney] as counsel." *Id.* "Titlow has not presented any evidence indicating that [counsel] advised her to withdraw her plea or that he was otherwise a decisive factor in her decision to go to trial. Instead, the record indicates that she had wanted to change her plea and enlisted [the attorney] as new counsel to do just that." App. 27a. (Batchelder, J., dissenting).

Second, the panel majority failed to identify any conflict between the Michigan Court of Appeals decision and this Court's precedent. "Any advice that Titlow may have received from [her new attorney] was the result of Titlow's wanting new counsel and no longer wanting to plead guilty." App. 28a. (Batchelder, J., dissenting.) "It is undoubtedly reasonable for an attorney to recommend that his client reject a plea if the client maintains her innocence." *Id.* There "is nothing in the record establishing that the case file would have undermined any advice that [the new attorney] may have given Titlow." App. 29a. (Batchelder, J., dissenting).

Finally, "*Lafler* . . . does not require the trial court to resentence Titlow." App. 31a, citing *Lafler*, 132 S. Ct. at 1389 (Batchelder, J., dissenting). And "it is not the trial court's responsibility . . . to 'fashion a sentence for Titlow that . . . remedies the violation of her constitutional right,' as the remedy for the violation is the government's reoffering of the original plea agreement." App. 31a–32a, citing *Lafler*, 132 S. Ct. at 1389 (Batchelder, J., dissenting). The State of Michigan now seeks this Court's review.

REASONS FOR GRANTING THE PETITION

I. It is not ineffective assistance for an attorney to honor his client's desire to maintain innocence.

The Michigan Court of Appeals denied Titlow's ineffective-assistance claim based on Titlow's failure to show constitutionally deficient performance by his second attorney, Toca. On the record before it, the state court found that Titlow "told a sheriff's deputy at the jail that he planned to plead guilty despite his protestations of innocence" and that "[t]he deputy suggested that it would not be proper to plead guilty to an offense that [Titlow] did not commit, and perhaps [Titlow] should talk with another attorney." App. 100a. The state court further found that "[t]he record discloses that the second attorney's advice was set in motion by a [Titlow's] statement to the sheriff's deputy that he did not commit the offense." App. 101a. That finding makes sense, because Titlow's first attorney had advised him about the strength of the state's case and all of the potential consequences of going to trial.

Under AEDPA, a federal court can only grant habeas if a state-court decision involved an unreasonable application of this Court's precedent, 28 U.S.C. § 2254(d)(1), or if the state court's factual findings were unreasonable, 28 U.S.C. § 2254(d)(2). "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington* v. *Richter*, 131 S. Ct. 770, 786 (2011).

With respect to the law, the Michigan Court of Appeals was correct that the final decision to plead guilty is always the defendant's, not the attorney's. Michigan Rule of Professional Conduct 1.2(a) states that "[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, with respect to a plea to be entered . . . ." Accord *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004) (defendant retains "the ultimate authority" to determine whether to plead guilty); ABA Model Rules of Prof'l Conduct R. 1.2(a). The Michigan Court of Appeals expressly acknowledged this rule: "When a defendant proclaims his innocence . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty—no matter how 'good' the deal may be." App. 102a. Because the Michigan Court of Appeals did not misapply this Court's precedents, 28 U.S.C. § 2254(d)(1), the panel majority should have presumed, absent contrary evidence, that Toca honored his ethical obligation to follow his client's wishes.

With respect to the facts, the panel majority violated § 2254(d)(2) deference in two ways. First, the majority said that the Michigan Court of Appeals' ruling was unreasonable because Toca failed to advise Titlow of his sentencing exposure at trial or the reasonableness of his plea offer without first examining the evidence. App. 19a–20a. But as Chief Judge Batchelder aptly noted, "the record does not establish that Toca's advice was the decisive factor in Titlow's decision to withdraw her plea." App. 26a (Batchelder, J, dissenting). Rather, the "record shows that Titlow wanted to withdraw her plea before she ever enlisted Toca as counsel." *Id.* This is consistent with Titlow's insistence that he was innocent. Indeed, aside from his

own, unsworn, post-conviction comments at sentencing, Titlow provided no record evidence that Toca was the reason or even a decisive factor in his decision to withdraw his plea. Indeed, Titlow testified at his plea withdrawal hearing that he "fully under[stood] the consequences" of withdrawing his plea and did so "freely and voluntarily."

Titlow's understanding came from the fact that, just a few weeks earlier, his first attorney, Richard Lustig, had thoroughly discussed the merits of the plea offer with Titlow. Lustig had "gone over all of the evidence" with Titlow "over a long period of time," and advised Titlow about the elements necessary for the prosecution to secure a conviction. (Titlow also had the benefit of adverse witness testimony during a three-day preliminary exam.) Titlow understood that "although he didn't participate in what appear[ed] to be a smothering," a jury could find him guilty of first-degree murder, second-degree murder, or manslaughter. Titlow was "satisfied" with Lustig's advice, and there has never been a finding that Lustig was ineffective. The record belies any claim that Titlow did not know about the advantages and disadvantages of pleading or about the strength of the evidence.

Second, the panel majority focused myopically on a statement by Titlow's prior counsel that Toca did not pick up Titlow's case file until after the plea had been withdrawn. This was erroneous in two respects.

To begin, the panel majority apparently assumed that material in the case file was not otherwise available to Toca. This assumption is misguided and contrary to 28 U.S.C. § 2254(d)(2). The material would have been available either by reviewing public court

files or by asking the prosecutor to provide additional copies of discovery material—a common practice between state prosecutors and criminal defense attorneys in Michigan. Nothing in the record shows that Toca did not obtain material in the case file from other sources. In fact, at the hearing where Titlow withdrew his plea, Toca said that "[t]here's a lot of material here," implying that he had a significant amount of material already in his possession by that date. Under *Strickland* and *Harrington*, the panel majority should have presumed that counsel made an informed recommendation to Titlow; instead, it presumed the exact opposite. App. 19a (where the record was silent with respect to the advice Toca gave Titlow, the panel majority concluded that Toca "failed to fulfill his 'clear obligation' to provide sufficient advice to Titlow during the plea-negotiation stage."). Further, there is nothing in the record showing that the case file would have undermined any advice that Toca may have given Titlow: the state's evidence did not assure a first-degree murder conviction; indeed, the jury convicted Titlow of a lesser-included offense.

More important, even if Toca had reviewed the case file, advising Titlow to withdraw his plea either because he maintained his innocence or because he pleaded to an above-guideline sentence would "not fall below an objective standard of reasonableness." That is because Titlow hired Toca for the express purpose of withdrawing his plea. The "record indicates that [Titlow] had wanted to change her plea and enlisted Toca as new counsel to do just that." App. 27a (Batchelder, J., dissenting.) Toca did not provide ineffective assistance by honoring Titlow's decision to maintain his innocence.

II. There is a mature circuit conflict regarding the evidence needed to support a defendant's claim that he would have accepted a plea but for counsel's deficient advice.

In the context of a rejected plea, *Strickland*'s prejudice component requires a defendant to show that deficient counsel deprived him of the opportunity to plead guilty. In *Lafler*, this Court articulated a three-part test for this proof, with the first part divided into two additional sub-parts. A defendant must show "a reasonable probably

> [1] that the plea offer would have been presented to the court (i.e.,
>
> > [a] that the defendant would have accepted the plea and
> >
> > [b] the prosecution would not have withdrawn it in light of intervening circumstances),
>
> [2] that the court would have accepted its terms, and
>
> [3] that the conviction or sentence, or both, under the offer's terms would have been less severe" than the punishment ultimately faced.

132 S. Ct. at 1385. The question here is what proof satisfies sub-component [1][a], i.e., that defendant would have accepted the plea.

The Sixth Circuit rested its analysis on Titlow's previous acceptance of the plea offer (before he rejected it), the sentencing disparity, and his post-conviction

testimony that he would have not withdrawn but for Toca's ineffective assistance. App. 22a. Consider how each of these evidentiary pieces fit within the *Lafler* multi-part rubric.

The plea's initial presentation and trial-court acceptance satisfy parts (1)(b) and (2) of the *Lafler* test. The sentencing disparity satisfies part (3). But Titlow's acceptance of the first plea cannot be used to satisfy (1)(a), because Titlow withdrew the plea and maintained his innocence.[3] Titlow cannot rely on the sentencing disparity to satisfy (1)(a), either. The third part of the *Lafler* test *always* requires a defendant to show a disparity, so sentencing disparity is a given.

That leaves only Titlow's self-serving, post-conviction testimony that he would have kept his plea deal absent ineffective assistance. In the Sixth Circuit, nothing more is required: "Although some circuits have held that a defendant must support his own assertion that he would have accepted the offer with additional objective evidence, we in this circuit have declined to adopt such a requirement." *Smith* v. *United States*, 348 F.3d 545, 551 (6th Cir. 2003) (quoting *Griffin* v. *United States*, 330 F.3d 733, 737 (6th Cir. 2003)); App. 22a (citing *Smith* as support for the panel majority's ability to consider Titlow's post-conviction testimony "as evidence of Titlow's [pre-conviction] intent.").

---

[3] The panel majority further erred by relying on *Smith*'s language concerning the significance of a defendant's protestations of innocence. App. 16a--17a. This Court's precedent indicates that a defendant can enter a guilty plea while still protesting his innocence. *North Carolina* v. *Alford*, 400 U.S. 25, 33 (1970). But that is very different from the situation here, where Titlow withdrew a plea because he *maintained* his innocence.

But at least five other circuits disagree. The Seventh, Second, and Eleventh Circuits have all held, in published opinions, that a defendant's post-conviction testimony that he would have accepted a plea offer is not sufficient, and that objective evidence of the defendant's intent is required. *Paters* v. *United States*, 159 F.3d 1043, 1047 (7th Cir. 1998); *Toro* v. *Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991); *United States* v. *Gordon*, 156 F.3d 376, 381 (2d Cir. 1998); *Diaz* v. *United States*, 930 F.2d 832, 835 (11th Cir. 1991). And the Tenth and Eighth Circuits have done the same, albeit in unpublished decisions. *United States* v. *Morris*, 106 Fed. App'x 656, 2004 WL 1598792, at *2 (10th Cir. July 19, 2004); *Maldonato* v. *Archuleta*, 61 Fed. App'x 524, 2003 WL 361303, at *2 (10th Cir. Feb. 20, 2003); *Bachicha* v. *Shanks*, 66 F.3d 338, 1995 WL 539467, at *1 (10th Cir. Aug. 31, 1995); *Moses* v. *United States*, 175 F.3d 1025, 1999 WL 195675, at *1 (8th Cir. 1999).

Although *Lafler* did not directly address this issue, that case did involve objective evidence, including testimony by counsel at an evidentiary hearing that the petitioner was open to pleading guilty, *Cooper* v. *Lafler*, 376 Fed. Appx. 563, 572 (6th Cir. 2010), and communication between the petitioner and the court before trial where the petitioner admitted guilt and expressed a willingness to accept the offer. *Lafler*, 132 S. Ct. at 1383. Titlow offers nothing similar in the way of objective evidence here.

This Court should grant certiorari and reverse the Sixth Circuit. A defendant's post-conviction testimony that he would have accepted a pre-trial plea is nothing more than plea bargainer's remorse. It is wholly

unsurprising that, after having been convicted of second-degree murder, a defendant would suddenly assert his prior willingness to plead. As five circuits have recognized, the courts should require something more: objective evidence that corroborates a defendant's purported intent, as in *Lafler*. This Court in *Lafler* could not have intended such a de minimus path to habeas relief.

This is not a circuit split that should percolate. A Westlaw search reveals that in the short six months since this Court's decision in *Lafler*, lower-court opinions have cited it more than two hundred times. The Court should resolve the fundamental conflict between the circuits regarding whether a defendant's post-conviction comments, standing alone, are sufficient to show prejudice.

III. *Lafler* does not require a state trial court to resentence or to remedy the purported constitutional violation.

In *Lafler*, this Court held that a state trial court has three options on remand: (1) "vacate the convictions and resentence respondent pursuant to the plea agreement"; (2) "vacate only some of the convictions and resentence respondent accordingly"; or (3) "leave the convictions and sentence from trial undisturbed." *Lafler*, 132 S. Ct. at 1391. In implementing a remedy, the Court did not define the boundaries of a state trial court's discretion, and, instead, left "open to the trial court" how best to exercise its discretion. *Id.* This Court identified two considerations of relevance: the defendant's earlier

willingness to accept responsibility for his actions and information discovered post plea. *Id.* at 1389.

In two ways, the panel majority here created an entirely new scheme for fashioning a *Lafler* remedy.

First, the majority ordered the trial court to resentence. App. 25a (if the state reoffers and Titlow accepts the plea, "the state may then exercise its discretion to fashion a sentence"). As Chief Judge Batchelder noted, "*Lafler* . . . does not require the trial court to resentence Titlow. Instead, *Lafler* states that once the prosecution reoffers the plea proposal, 'the judge can exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." App. 31a (Batchelder, J., dissenting (citing *Lafler*, 132 S. Ct. at 1389).

Second, the panel majority directed the state trial court to fashion its sentence so as to remedy "the violation of [Titlow's] constitutional right to the effective assistance of counsel." App. 25a. But "it is not the trial court's responsibility, as the majority states, to 'fashion a sentence for Titlow that . . . remedies the violation of her constitutional right,' as the remedy for the violation is the government's reoffering of the original plea agreement." App. 31a–32a (Batchelder, J., dissenting (citing *Lafler*, 132 S. Ct. at 1389).) In sum, "*Lafler* does not impose such requirements on the trial court, and the majority's statements to the contrary are incorrect." App. 32a (Batchelder, J., dissenting).

These are not small mistakes. The panel majority's analysis impinges on the state trial court's discretion to accept or reject a plea offer. The circumstance under

which a trial court may accept or reject a plea offer is created by state law, and its boundaries should be defined by it. See Mich. Ct. Rule 6.302(C)(3) ("If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may . . . reject the agreement"). The Michigan Supreme Court has recognized that loss of judicial autonomy in sentencing is one of the "proper" considerations in exercising the trial court's discretion. *People* v. *Grove*, 455 Mich. 439, 460; 566 N.W.2d 547 (1997). But the panel majority says this discretion is now limited, and that endorsing the original sentence would cause the *Lafler* remedy to be "illusory." App. 24a–25a. *Lafler* has no such warning.

The Sixth Circuit's decision in this case is its first published decision to apply *Lafler*. The panel's decision will be binding on both subsequent panels of the Sixth Circuit and the district courts below it, and the opinion will likely influence other federal courts.

Accordingly, this Court should grant the petition and clarify that (1) a state trial court's remand options are those *Lafler* describes; and (2) a state trial court does not abuse its discretion by allowing its original sentence to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Laura Moody
Appellate Division Chief

Raina Korbakis
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

Dated: OCTOBER 2012

PETITION APPENDIX TABLE OF CONTENTS

United States Court of Appeals
For the Sixth Circuit
Opinion
Issued May 22, 2012 ..... 1a-32a

United States Court of Appeals
For the Sixth Circuit
Judgment
Issued May 22, 2012 ..... 33a

United States District Court –
Eastern District of Michigan
Opinion and Order Denying Petition
Issued October 19, 2010 ..... 34a-97a

Michigan Court of Appeals
Order Affirming Conviction
Issued December 11, 2003 ..... 98a-119a

Michigan Supreme Court
Order
Issued May 28, 2004 ..... 120a

United States Court of Appeals
For the Sixth Circuit
Order Denying Petition for En Banc Rehearing
Issued August 2, 2012 ..... 121a

United States Court of Appeals
For the Sixth Circuit
Order Denying Request to Stay Mandate
Issued August 8, 2012 ..... 122a

United States Court of Appeals
For the Sixth Circuit
Mandate
Issued August 10, 2012 ..... 123a

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 12a0147p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VONLEE NICOLE TITLOW,
Petitioner-Appellant,
v.
SHERRY L. BURT, Warden,
Respondent-Appellee.
No. 10-2488

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 07-13614—Marianne O. Battani, District Judge.

Argued: January 17, 2012
Decided and Filed: May 22, 2012
Before: BATCHELDER, Chief Judge; CLAY and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Laura Kathleen Sutton, Manchester, Michigan, for Appellant. Laura Graves Moody, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Laura Kathleen Sutton, Manchester, Michigan, for Appellant. John S. Pallas, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

GILMAN, J., delivered the opinion of the court, in which CLAY, J., joined. BATCHELDER, C. J. (pp. 20–24), delivered a separate dissenting opinion.

OPINION

RONALD LEE GILMAN, Circuit Judge. Vonlee Nicole Titlow, a transgender prisoner presently incarcerated at the Richard A. Handlon Correctional Facility in Ionia, Michigan, appeals from the district court's denial of her petition for a writ of habeas corpus following her conviction in state court for the second-degree murder of her uncle. Titlow raises several ineffective-assistance-of-counsel claims, as well as a prosecutorial misconduct claim and a challenge to the trial court's response to a question from the jury.

Although the district court correctly determined that most of Titlow's claims lack merit or are procedurally defaulted, the court erred in concluding that Titlow failed to establish an ineffective-assistance-of-counsel claim arising out of her plea-bargaining experience. The Michigan Court of Appeals' conclusion that her second attorney was not deficient when he advised Titlow to withdraw the plea agreement negotiated by her first attorney was unreasonable because the record reflects that the second attorney totally failed to investigate her case prior to recommending that she withdraw the guilty plea. In contrast to the 7-to-15-year sentence that Titlow would have received under the plea agreement, she was convicted by a jury and sentenced to 20-to-40 years in prison. For the reasons set forth below, we **REVERSE** the judgment of the district court and conditionally **GRANT** the petition for a writ of habeas corpus, giving the State 90 days to reoffer Titlow the original plea agreement or, failing that, to release her.

I. BACKGROUND

A Michigan jury convicted Titlow of the second-degree murder of her uncle, Donald Rogers, an offense that took place in August 2000. At the time of the offense, Titlow was living with her uncle and his wife, Billie Rogers. Donald was an alcoholic and allegedly wealthy. In the early morning hours of August 12, 2000, police officers were dispatched to the Rogers' residence in Troy, Michigan, where they found Donald dead on the kitchen floor with a drinking glass in his hand. Titlow and Billie told the officers that they had found Donald dead on the floor when they returned from gambling at a casino—a regular pastime of Billie's—during the middle of the night. But the officers noted that several aspects of the crime scene and of the women's behavior appeared inconsistent with what Titlow and Billie were telling them.

Although Donald's body was taken to the medical examiner's office, no autopsy was ever performed. The medical examiner initially determined that the cause of Donald's death was a heart attack, with arterial sclerotic cardiovascular disease (related to his alcoholism) as a contributing factor. His body was cremated before any further examination was conducted. Some time later, however, Donald's death certificate was amended to list asphyxia by smothering as the cause of death, with acute alcohol intoxication as a contributing factor. The amendment was based on photographs of the corpse that showed small scrapes around Donald's nose consistent with impressions made by a decorative woven pillow.

Several days after Donald's death, the officers interviewed Danny Chahine, Titlow's paramour. Titlow had treated Chahine to dinner shortly before the police interview and had filled him in on some of the events that led to Donald's death. Chahine informed the police that Titlow had previously told him that Billie wanted to get rid of her husband and was willing to pay Titlow $25,000 to do so. At the dinner, Titlow told Chahine that she and Billie had found Donald passed out on the kitchen floor when they returned from the casino. Billie then suggested that they pour vodka down Donald's throat while holding his nose shut, and she began doing so herself. Titlow initially balked, but at Billie's encouragement began pouring a small amount of vodka down Donald's throat and held his mouth shut. Titlow soon relented, however, stopped Billie from pouring more vodka down Donald's throat, and walked away. (The evidence suggests that Billie later smothered Donald with a pillow when Titlow left the room.) After his interview with the police, Chahine agreed to wear an audio recording device during a subsequent dinner with Titlow, at which time Titlow again recounted the details surrounding Donald's death and asked Chahine to serve as an alibi for her and Billie.

Billie was the sole beneficiary of Donald's estate. Shortly after his death, she purchased new cars for herself and Titlow with money transferred from one of Donald's bank accounts. She also wrote Titlow a check for $70,260, which Titlow used to open a certificate-of-deposit account, and gave Titlow gambling money that Billie deducted from a ledger with $100,000 written on it. Billie also sent large sums of money to her own daughter and mother.

Titlow and Billie were arrested on first-degree murder charges in January 2001. The State decided to try them separately for their involvement in the crime. Attorney Richard Lustig represented Titlow and negotiated a plea agreement on her behalf. Under the agreement, the State offered to reduce Titlow's charges to manslaughter, with a 7-to- 15-year sentence, on the conditions that Titlow plead guilty, submit to a lie-detector test, testify against Billie at trial, and not challenge the prosecutor's recommended sentencing range on appeal.

The state trial court held a plea hearing in October 2001. Titlow confirmed that she had reviewed all the evidence with her attorney, understood the facts that could support a conviction of first-degree murder, and was aware that the proposed sentencing range exceeded the standard guidelines range for a manslaughter conviction in Michigan. She also admitted to pouring vodka down Donald's throat shortly before Billie smothered Donald to death and to receiving $100,000 to remain silent about Billie's actions. The court accepted the plea agreement and scheduled the matter for sentencing in December 2001.

During her confinement in a local jail between these hearings, Titlow spoke with Eric Ott, a sheriff's deputy assigned to the jail, who advised her not to plead guilty if she believed that she was innocent. Ott referred Titlow to attorney Frederick Toca, who agreed to represent her in exchange for some jewelry and the media rights to her case. The record contains no details about Toca's conversations with Titlow before November 29, 2001, the date set by the court to hear

the motion filed by Toca to withdraw Titlow's guilty plea.

On the record, the State represented that it previously had conversations with Toca in which Toca represented that Titlow would not testify against Billie unless Titlow's recommended sentencing range was reduced to 3-to-15 years. Toca asserted at the sentencing hearing that he "felt that the offer [of 7-to-15 years] was out of line, that seven years is outside of Ms. Von Lee [sic] Titlow's guidelines. Her guidelines are actually two to five. . . . Based upon [the State's refusal to accept a lower sentencing range], your Honor, we are withdrawing."

Toca also noted that he had been "retained last week" and that "[t]here's a lot of material here" that he still needed to review prior to trial. Titlow acknowledged her understanding that the first-degree murder charge would be reinstated if she withdrew her guilty plea. At no point during the November 2011 hearing did either Titlow or Toca mention Titlow's alleged assertions of innocence to Deputy Ott. The court ultimately allowed Titlow to withdraw her plea because she was declining to testify at Billie's trial.

Toca did not obtain Titlow's file, inspect the government's discovery materials, or speak with Lustig (Titlow's former counsel) about the case until January 10, 2002, approximately a month and a half *after* the plea-withdrawal hearing. This despite the fact that Lustig had made the file available to Toca around the time of the November 29, 2001 hearing, which was when Toca officially substituted himself as Titlow's counsel. All of this information was presented to the Michigan Court of Appeals on Titlow's direct appeal.

Soon after obtaining the file, Toca moved to withdraw as counsel, citing a breakdown in communications and a lack of funds to proceed with the defense. At a hearing in February 2002, the court questioned Toca's budgetary constraints (which was his stated reason for failing to order the transcripts from Billie's recently concluded trial) and learned about his questionable financial agreement with Titlow. The court then appointed William Cataldo as Titlow's trial counsel.

Titlow's case proceeded to trial in March 2002. The State's theory of the case was that Titlow helped Billie kill Donald in order to obtain money for a sex-change operation, since Titlow, although born a man, had been living as a woman for many years. Titlow offered several theories in her defense: that she was merely present and did not participate in the murder; that she had abandoned any intent to aid in the murder and was guilty of a lesser crime only; and that Donald died from acute, self-induced intoxication rather than anything that she had done.

At trial, Titlow took the stand in her own defense. She admitted to putting her hand over Donald's mouth after Billie poured vodka down his throat. Titlow further confirmed that she poured some vodka as well, but in a much smaller quantity. She also testified that she ultimately stopped Billie from giving Donald more alcohol and then left the room. When she returned, she saw Billie holding a pillow over Donald's face. Titlow conceded that she accepted Billie's money as a bribe to keep silent.

The jury convicted Titlow of second-degree murder, and the court sentenced her to 20-to-40 years in prison.

At her sentencing hearing, Titlow stated that she "would have testified against Billie during her trial, had I not been persuaded to withdraw my plea agreement and the chance to testify, because an attorney promised me he would represent me. . . . I don't know a lot about the law, because I've never been in serious trouble before. So I trusted what he was saying." Billie, in contrast, was acquitted after her jury trial, but no further details about her trial have been included in the present record.

The Michigan Court of Appeals affirmed Titlow's sentence on direct appeal and rejected all of her constitutional challenges. *People v. Titlow*, No. 241285, 2003 WL 22928815, at *1 (Mich. Ct. App. Dec. 11, 2003) (per curiam) (unpublished opinion). Leave to appeal was denied by the Michigan Supreme Court. *People v. Titlow*, 680 N.W.2d 900 (Mich. May 28, 2004) (unpublished table opinion). Titlow then filed a motion for relief from judgment in the state trial court, which was denied. The Michigan Court of Appeals subsequently denied leave to appeal "because defendant has failed to meet the burden of establishing entitlement to relief under [Michigan Court Rule] 6.508(D)," *People v. Titlow*, No. 273274, slip op. at 1 (Mich. Ct. App. Apr. 27, 2007) (unpublished opinion), and the Michigan Supreme Court did the same, *People v. Titlow*, 738 N.W.2d 715 (Mich. Sept. 24, 2007) (unpublished table opinion).

Titlow filed her petition for a writ of habeas corpus under 28 U.S.C. § 2254 in August 2007. The district court issued an opinion denying the petition in October 2010, but granted a certificate of appealability on all of Titlow's claims. This timely appeal followed.

II. ANALYSIS

A. Standard of review

A district court's legal conclusions in a habeas case are reviewed de novo and its factual findings are reviewed under the clear-error standard. *Harris v. Haeberlin*, 526 F.3d 903, 909 (6th Cir. 2008). The state-court decision under review is entitled to deference pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which is codified at 28 U.S.C. § 2254(d). That subsection provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state-court decision is considered "contrary to" clearly established federal law under § 2254(d)(1) if the

two are "diametrically different, opposite in character or nature, or mutually opposed." *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (internal quotation marks omitted). Alternatively, to be deemed an "unreasonable application" of clearly established federal law under that subsection, a state-court decision on the merits must be "objectively unreasonable," *id.* at 409, not simply incorrect, *id.* at 412.

In order to demonstrate that the state court's decision was based on an unreasonable determination of the facts under § 2254(d)(2), a petitioner must both establish the "unreasonable determination" and show "that the resulting state court decision was 'based on' that unreasonable determination." *Rice v. White*, 660 F.3d 242, 250 (6th Cir. 2011). We may take into account only "the record that was before the state court that adjudicated the claim on the merits" when evaluating an AEDPA claim. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). The state court's findings of fact are presumed to be correct unless they are rebutted by clear and convincing evidence. *Benge v. Johnson*, 474 F.3d 236, 241 (6th Cir. 2007). As a result, "even if reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's determination" unless that determination is unreasonable. *Wood v. Allen*, 130 S. Ct. 841, 849 (2010) (alterations and internal quotation marks omitted). "The standard is demanding but not insatiable," and the Supreme Court has noted that "deference does not by definition preclude relief." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (brackets and internal quotation marks omitted).

In short,

> "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Harrington v. Richter, 131 S. Ct. 770, 786-87 (2011). Not every constitutional error in a state-court proceeding therefore merits the issuance of a writ of habeas corpus. *Williams*, 529 U.S. at 375. But those that "undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the federal writ." *Id.*

B. Ineffective assistance of interim counsel Frederick Toca

1. Applicable law

The Sixth Amendment to the U.S. Constitution guarantees criminal defendants the right to the assistance of counsel during their criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). This right extends to the plea-bargaining process, during which defendants are "entitled to the effective assistance of competent counsel." *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012) (internal quotation marks omitted). "[T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." *Id.* at 1388.

In *Hill v. Lockhart*, 474 U.S. 52 (1985), the Supreme Court held that the test established in *Strickland*, which addresses ineffective assistance of counsel at the trial stage, applies equally to the plea-bargaining process. *Hill*, 474 U.S. at 58-59 (concluding that the defendant had not demonstrated that his counsel was ineffective in erroneously advising him about the parole-related conditions set forth in the proposed plea agreement because the defendant failed to allege that he would have rejected the plea but for counsel's advice); *see also Lafler*, 132 S. Ct. at 1384 (reaffirming that the *Strickland* analysis applies to ineffective-assistance-of-counsel claims arising out of the plea-bargaining process).

There are two components to the *Strickland* test for violations of a defendant's right to the effective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 687.

When evaluating counsel's performance under the first step of *Strickland*, we apply a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690; *see also Pough v. United States*, 442 F.3d 959, 966 (6th Cir. 2006)

(cautioning that courts should not "indulge in hindsight, but must evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors" (internal quotation marks omitted)). "Even under *de novo* review, the standard for judging counsel's representation is a most deferential one." *Harrington*, 131 S. Ct. at 788. A defendant challenging her attorney's conduct during plea bargaining therefore bears "a heavy burden," *Whiting v. Burt*, 395 F.3d 602, 617 (6th Cir. 2005), and "must show that counsel did not attempt to learn the facts of the case and failed to make a good-faith estimate of a likely sentence." *Short v. United States*, 471 F.3d 686, 692 (6th Cir. 2006) (internal quotation marks omitted).

Although "[t]he decision to plead guilty—first, last, and always—rests with the defendant, not his lawyer," this court has nonetheless maintained that "the attorney has a clear obligation to fully inform her client of the available options." *Smith v. United States*, 348 F.3d 545, 552 (6th Cir. 2003). "A failure to provide professional guidance to a defendant regarding his sentence exposure prior to a plea may constitute deficient assistance." *Moss v. United States*, 323 F.3d 445, 474 (6th Cir. 2003) (citing the habeas case of *Magana v. Hofbauer*, 263 F.3d 542, 550 (6th Cir. 2001)). Defense counsel thus carries the "paramount" duty to "ensure that the client's decision [to waive his constitutional right to trial] is as informed as possible." *Miller v. Straub*, 299 F.3d 570, 580 (6th Cir. 2002). "A criminal defendant has a right to expect at least that his attorney will review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears

on those elements, and explain the sentencing exposure the defendant will face as a consequence of exercising each of the options available." *Smith*, 348 F.3d at 553.

Supporting this duty is the concomitant obligation of conducting "reasonable investigations or [reaching] a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "Counsel cannot responsibly advise a client about the merits of different courses of action, [and] the client cannot make informed decisions, . . . unless counsel has first conducted a thorough investigation . . . ." *Dickerson v. Bagley*, 453 F.3d 690, 694 (6th Cir. 2006) (noting that such an investigation "should begin as quickly as possible" in order to aid in plea negotiations (internal quotation marks omitted)). The Sixth Amendment does not require that counsel provide an absolutely *correct* assessment of the comparative risks of a guilty plea versus a trial, but the Supreme Court has "recognize[d] that counsel must at least be *aware* of such risks, especially where the lack of awareness directly impacts the reasoning behind whatever advice is provided." *Miller*, 299 F.3d at 584 (Gilman, J., concurring) (emphasis added) (discussing *McMann v. Richardson*, 397 U.S. 759, 770 (1970)).

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," but "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. "It is not reasonable to refuse to investigate when the

investigator does not know the relevant facts the investigation will uncover." *Dickerson*, 453 F.3d at 696. If an attorney's "failure to investigate does not reflect sound professional judgment," deference to the attorney's purported strategic choices is "not appropriate." *Dando v. Yukins*, 461 F.3d 791, 799 (6th Cir. 2006) (refusing to defer to the attorney's decision not to invest resources in a valid and available defense because the decision represented a misunderstanding of the applicable law rather than sound professional judgment).

To meet the prejudice prong of the *Strickland* test in the context of a rejected plea offer,

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012). "A reasonable probability," as the Supreme Court has previously defined the term, "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. This burden is relatively low, being less than a preponderance of the evidence. *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) (noting

that a state-court decision applying a preponderance-of-the evidence standard to a question of attorney competence would be contrary to *Strickland*'s holding "that the prisoner need only demonstrate a 'reasonable probability'" of a different outcome); *Cornwell v. Bradshaw*, 559 F.3d 398, 405 (6th Cir. 2009) (explaining that a reasonable probability is "less than a preponderance of the evidence").

The Supreme Court has recently indicated that the simple fact of a higher sentence after trial is sufficient to demonstrate prejudice. *See Lafler*, 132 S. Ct. at 1387 ("[P]rejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence."). And this court has recognized that a substantial disparity between the plea offer and the post trial sentence provides evidence that the defendant would have accepted the plea. *See, e.g.*, *Smith*, 348 F.3d at 552 (recognizing the Sixth Circuit's adoption of this evidentiary principle in a case involving a 60-month plea offer versus a 156-month sentence); *Magana v. Hofbauer*, 263 F.3d 542, 551-52 (6th Cir. 2001) (involving a 10-year plea offer versus a sentence of two consecutive 10-to-20-year terms).

A defendant's conduct and statements during plea negotiations may also factor into our prejudice analysis. *See, e.g.*, *Magana*, 263 F.3d at 552 (concluding that a comment made by the defendant during plea negotiations was enough to show a reasonable probability that he would have accepted the plea). But this court has not considered declarations of innocence clear evidence of a defendant's knowing rejection of a plea offer because defendants may have

legitimate reasons for continuing to maintain their innocence during and even after plea negotiations. *See Smith*, 348 F.3d at 551-52 (listing several reasons why a defendant might want to continue asserting his innocence and yet be amenable to a plea offer). And, unlike some circuits, this court does not require "that a defendant must support his own assertion that he would have accepted the offer with additional objective evidence." *Id.* at 551 (internal quotation marks omitted).

We may therefore consider affidavits submitted by the defendant during his state court appeals as well as other statements made by the defendant throughout the proceedings. *Id.* (overturning the lower court's conclusion that the defendant had failed to support his ineffective-assistance-of-counsel claim and directing the court to consider the defendant's "own self-serving testimony"). Affidavits furnished by counsel, however, receive more scrutiny and should explain not only that the defendant "was aware of a plea offer," but also that the attorney "actually discussed the terms of the agreement with" the defendant, informed the defendant "of the dramatically higher sentence potential" that he or she faced at trial, and explained the likelihood of not prevailing at trial. *Id.* at 553.

2. Analysis

On direct appeal, the Michigan Court of Appeals considered evidence not presented to the trial court concerning Titlow's conversations with Sheriff's Deputy Eric Ott, who was assigned to the jail where Titlow was being held, and concluded as follows:

> The record discloses that the second attorney's advice was set in motion by defendant's statement to a sheriff's deputy that [s]he did not commit the offense. Defendant offers the affidavit of [her] first attorney, who negotiated a plea agreement that he thought was in defendant's best interests. When a defendant proclaims [her] innocence, however, it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty—no matter how "good" the deal may appear. We therefore reject defendant's argument that [her] second attorney gave [her] "grossly erroneous advice." On the proofs and arguments offered by defendant, defendant has failed to demonstrate that [her] second attorney's advice to withdraw [her] plea fell below an objective standard of reasonableness.

People v. Titlow, No. 241285, 2003 WL 22928815, at *2 (Mich. Ct. App. Dec. 11, 2003) (per curiam) (unpublished opinion) (footnotes omitted).

But the Court of Appeals' conclusion is undermined by the statements that Toca, Titlow's second attorney, made on the record at the hearing to withdraw Titlow's plea. Toca did not refer to Titlow's claims of innocence at any point throughout the hearing. Instead, Toca explained that the decision to withdraw Titlow's plea was based on the fact that the State's plea offer was substantially higher than the Michigan guidelines for second-degree murder. The reason that Toca offered thus explicitly conflicts with the rationale on which the Michigan Court of Appeals relied. This sufficiently rebuts the Michigan Court of Appeals' finding that the

plea withdrawal was based on Titlow's assertion of innocence. *See Benge v. Johnson*, 474 F.3d 236, 241 (6th Cir. 2007) (stating the general rule that a state court's findings of fact are presumed correct unless rebutted by clear and convincing evidence).

Moreover, even where counsel properly advises a client that she has the right to go to trial if she maintains her innocence, this advice must be cabined by a larger discussion in which counsel "fully inform[s the] client of the available options," *Smith*, 348 F.3d at 552, and "ensure[s] that the client's decision is as informed as possible," *Miller*, 299 F.3d at 580. The record in this case contains no evidence that Toca "explain[ed] the elements necessary for the government to secure a conviction, discuss[ed] the evidence as it bears on those elements, [or] explain[ed] the sentencing exposure the defendant [would] face as a consequence of exercising each of the options available." *See Smith*, 348 F.3d at 553. We therefore conclude that Toca failed to fulfill his "clear obligation" to provide sufficient advice to Titlow during the plea-negotiation stage. *See id.* (noting that affidavits from counsel furnished for post-conviction review should detail counsel's conversations with the defendant in order to adequately refute an ineffective-assistance-of-counsel claim).

The Michigan Court of Appeals acknowledged the affidavit from Lustig, Titlow's initial counsel, which advanced Lustig's conclusion that the plea agreement was in Titlow's best interests. But the court concluded that Lustig's belief alone was insufficient to demonstrate that Toca performed ineffectively. In so concluding, however, the Court of Appeals failed to

address the final paragraph of Lustig's affidavit, in which he avers "[t]hat Mr. Toca did not pick up the discovery materials from my office, nor discuss the facts of this case with me until January 10, 2002 as evidenced by the attached Acknowledgment of Receipt signed by Mr. Toca, although said file was made available to him on or about November 29, 2001, the time of his substitution."

Toca thus had no way to adequately advise Titlow on her sentencing exposure at trial or on the reasonableness of the plea offer without first examining the evidence that the State had against her. But Toca did not have this material in his possession when he rendered his advice to Titlow and did not receive it until shortly before he sought to withdraw as counsel. The Supreme Court has long held that counsel has an obligation to conduct a "reasonable investigation," *see Strickland v. Washington*, 466 U.S. 668, 691 (1984), such that counsel would become aware of the risks of withdrawing the plea, "especially where the lack of awareness directly impacts the reasoning behind whatever advice is provided," *Miller*, 299 F.3d at 584 (citing *McMann v. Richardson*, 397 U.S. 759, 770 (1970)).

In the present case, the State's evidence against Titlow clearly would have had (or clearly *should* have had) a major impact on Toca's advice during plea negotiations. The failure to obtain Titlow's file (a rather easy task) before offering any advice was therefore totally inconsistent with a reasonable investigation. *See Dickerson v. Bagley*, 453 F.3d 690, 696 (6th Cir. 2006) ("It is not reasonable to refuse to

investigate when the investigator does not know the relevant facts the investigation will uncover.").

Nor can we conclude that this fundamental omission reflected sound professional judgment or a strategic choice. *Cf. McMann*, 397 U.S. at 771 (requiring that counsel offer advice that is "within the range of competence demanded of attorneys in criminal cases"); *Dando v. Yukins*, 461 F.3d 791, 798-99 (6th Cir. 2006) (giving examples of defense counsel's actions that would not constitute sound professional judgment). For that reason, we need not afford deference to Toca's actions. *See Dando*, 461 F.3d at 799 ("Although courts are typically required to show heightened deference to an attorney's strategic decisions supported by professional judgment, where a failure to investigate does not reflect sound professional judgment, such deference is not appropriate."); *see also Strickland*, 466 U.S. at 690-91 (holding that, if counsel does not conduct a complete investigation, any allegedly strategic choices made thereafter may be considered reasonable only to the extent that the reasons for limiting the investigation can be considered reasonable).

In short, Toca "did not attempt to learn the facts of the case." *See Short v. United States*, 471 F.3d 686, 692 (6th Cir. 2006) (defining deficient performance as including situations where "counsel did not attempt to learn the facts of the case," but ultimately denying the defendant's ineffective-assistance-of-counsel claim on the facts presented (internal quotation marks omitted)). Here, Toca's performance during the plea bargaining stage was clearly deficient under the first element of the *Strickland* analysis.

Titlow must next demonstrate, under *Strickland*'s second element, "a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe" than the punishment that she ultimately faced. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012). Here, the facts speak for themselves: the plea offer was presented to and accepted by the state trial court at Titlow's initial plea hearing in October 2001. And no one disputes that the sentence Titlow ultimately received (20-to-40 years' imprisonment) was nearly three times the punishment that she was offered under the plea agreement (7-to-15 years' imprisonment). *See id.* at 1386 (noting that a sentence following trial that was three-and-a-half times more severe than the one offered in the plea agreement was evidence of prejudice).

Furthermore, Titlow's position that would she have accepted the plea offer but for Toca's intervening advice is bolstered by the fact that she had actually accepted the plea on the record at the October 2001 hearing. During her sentencing hearing following trial in March 2002, she reiterated this fact. We may consider this testimony as evidence of Titlow's intent. *See Smith*, 348 F.3d at 551 (determining that the district court could consider the defendant's testimony despite the court's description of this testimony as "self-serving").

The State's evidence against Titlow was strong. Even Titlow's version of the facts was not inconsistent with a second-degree murder conviction, and her recorded conversation with her paramour Chahine was highly incriminating. Toca's timely discovery of the State's evidence against Titlow likely would have (or at least should have) led him to change his recommendation as to withdrawing the plea. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (noting that the prejudice inquiry under the second prong of *Strickland* depends "on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea").

We therefore conclude that Titlow's Sixth Amendment rights were violated when Toca provided ineffective assistance of counsel at the plea-bargaining stage. The Michigan Court of Appeals' decision to the contrary unreasonably determined the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d)(2). Because we reach this conclusion, we need not address the remainder of Titlow's claims for habeas relief.

3. Appropriate remedy

The Supreme Court recently addressed the appropriate remedy for a similar constitutional violation in *Lafler*, noting that "Sixth Amendment remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." 132 S. Ct. at 1388 (internal quotation marks omitted). In the typical case where the sole injury suffered by the defendant was a higher sentence, "the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the

government offered in the plea, the sentence [s]he received at trial, or something in between." *Id.* at 1389.

But Titlow's situation is not such a simple case for two reasons. The first is that, by foregoing the plea agreement to a manslaughter charge, Titlow was convicted on the higher charge of second-degree murder. And second, the plea agreement's favorable sentencing terms were presumably based in large part on Titlow's willingness to testify against Billie. Following the revocation of her plea agreement, however, Titlow did not in fact so testify. Billie was acquitted and thus cannot be retried (she is also now deceased). The State, therefore, has lost the major benefit that it sought from the initial plea agreement.

In such a case, the Supreme Court has recognized that "resentencing based on the conviction at trial [and under the terms of the former plea agreement] may not suffice" because "[t]he time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer." *Id.* at 1389. Instead, "the proper exercise of [the state court's] discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal." *Id.* Provided that Titlow on remand accepts the proffered plea agreement, the state trial court would then have the discretion "to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." *Id.* In any event, the state court should continue to recognize the former plea offer as a "baseline [that] can be consulted" in fashioning the appropriate remedy. *Id.*

We remain concerned that the remedy articulated in *Lafler* could become illusory if the state court

chooses to merely reinstate Titlow's current sentence. But *Lafler* cautions that state courts must at least "consult[]" the initial plea agreement in crafting a new sentence for the defendant, which indicates—sufficiently for now—that the state court's discretion is not entirely unfettered. The proper scope of this discretion need not be considered unless the state court imposes a sentence greater than the initial plea agreement. What remedy Titlow might have in federal court if such occurs is an issue to be resolved another day.

Because we conclude that Titlow's Sixth Amendment right to counsel during the plea-bargain process was violated and because the initial plea offer was to a lesser included offense instead of the offense of conviction, we will reverse the judgment of the district court and conditionally grant the petition for a writ of habeas corpus, giving the State 90 days to reoffer Titlow the original plea agreement or, failing that, to release her. If the State in fact reoffers the plea agreement and Titlow accepts, the state court may then exercise its discretion to fashion a sentence for Titlow that both remedies the violation of her constitutional right to the effective assistance of counsel and takes into account any concerns that the State might have regarding the loss of Titlow's testimony against her aunt.

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the judgment of the district court and conditionally **GRANT** the petition for a writ of habeas corpus, giving the State 90 days to reoffer Titlow the original plea agreement or, failing that, to release her.

DISSENT

ALICE M. BATCHELDER, Chief Judge, dissenting. I must respectfully dissent from the majority's decision because, in my view, the Michigan Court of Appeals's denial of Titlow's ineffective assistance claim was reasonable. Our review of the Michigan Court of Appeals's application of *Strickland* is "doubly deferential," as we must "take a highly deferential look at counsel's performance through the deferential lens of § 2254(d)." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011) (internal citation and quotation marks omitted). The Michigan Court of Appeals properly denied Titlow's claim because the record does not establish that advice from her counsel, Frederick Toca, was the reason Titlow chose to withdraw her plea. But even if Toca had encouraged Titlow to withdraw her plea, such advice did not fall below an objective standard of reasonableness.

The primary error in the majority's opinion lies in its basic premise—that Titlow chose to withdraw her plea because of Toca's advice. Even if Toca's performance was deficient, which in my view it was not, the record does not establish that Toca's advice was the decisive factor in Titlow's decision to withdraw her plea. "A defendant challenging his attorney's conduct during plea bargaining must . . . . show that his lawyer's deficiency was a decisive factor in his decision to plead." *Short v. United States*, 471 F.3d 686, 692 (6th Cir. 2006) (internal citation and quotation marks omitted). The record shows that Titlow wanted to withdraw her plea before she ever enlisted Toca as counsel. In fact, her desire to withdraw her plea, in

response to Detective Ott's statement that she should not plead guilty if she was not guilty, was the reason she sought new counsel—Toca, as it turned out. More importantly, Titlow has argued throughout her appeals and habeas proceedings that it was Detective Ott's statement that motivated her to change her plea.[1] Titlow has not presented any evidence indicating that Toca advised her to withdraw her plea or that he was otherwise a decisive factor in her decision to go to trial. Instead, the record indicates that she had wanted to change her plea and enlisted Toca as new counsel to do just that.

Even if Toca was the reason Titlow chose to withdraw her plea, the record does not establish that his performance was deficient. The majority conducts a *de novo* review of Toca's performance after determining that the Michigan Court of Appeals based its determination on an unreasonable assessment of the facts. In doing so, the majority misreads the Michigan Court of Appeals's opinion, which states that the record indicates that Toca's advice "was set in motion" by Titlow's assertion of innocence. The majority concludes that this was an unreasonable assessment of the facts because Toca never mentioned Titlow's innocence at the change of plea hearing and instead argued for

---

[1] On habeas review, we are not free to choose one side of the facts, but the majority does just that in its description of some of the evidence presented at trial. For example, the record indicates that Detective Ott referred Titlow to his own attorney, Saunders Dorsey, and did not recommend Toca.

Likewise, the majority states that the "evidence suggests" Billie smothered Donald when Titlow left the room in spite of the fact that the record contains testimony that Titlow was in the room at the time.

withdrawal based on the excessiveness of the sentence. However, the Michigan Court of Appeals recognized that the basis for the plea withdrawal was the excessiveness of the sentence, *see Michigan v. Titlow*, No. 241285, 2003 WL 22928815, at *1 (Mich. Ct. App. Dec. 11, 2003), and Toca's statements at the change of plea hearing do not contradict the court's conclusion that his advice stemmed from her assertion of innocence. Instead, the record, and Titlow's own arguments throughout her appeals, support the Michigan court's conclusion because they demonstrate that she chose to obtain new counsel only after she had passed a polygraph test and Detective Ott advised her that she should not plead guilty if she was not guilty. Any advice that Titlow may have received from Toca was the result of Titlow's wanting new counsel and no longer wanting to plead guilty. The fact that at the hearing Toca asserted a separate reason for withdrawing the plea does not undermine this conclusion. Accordingly, the Michigan Court of Appeals did not base its determination on an unreasonable assessment of the facts.

Finally, even under *de novo* review, Titlow has not established that Toca's performance was deficient. First, Toca's decision to move for withdrawal of the plea based on either Titlow's claims of innocence or the excessiveness of the sentence was reasonable. It is undoubtedly reasonable for an attorney to recommend that his client reject a plea if the client maintains her innocence, as the record suggests Titlow did. It is just as reasonable for an attorney to advise a client that pleading to an above guidelines sentence was not in her best interest. The majority concludes that Toca was deficient because he did not investigate Titlow's case

file before moving to withdraw her plea. But, there is nothing in the record establishing that the case file would have undermined any advice that Toca may have given Titlow. The state's evidence did not assure a first-degree murder conviction; indeed, the jury convicted Titlow of a lesser included offense. Even if Toca had reviewed the case file, advising Titlow to withdraw her guilty plea either because she maintained her innocence or because she pleaded to an above-guideline sentence, in my view, does not fall below an objective standard of reasonableness.

Moreover, the time line of events leading to the plea withdrawal sheds some light on Toca's decision not to review the case file. Following her discussion with Detective Ott, Titlow eventually signed a fee agreement with Toca on November 26th. Billie Rogers's trial, in which Titlow agreed to testify as part of her plea, was scheduled to begin on November 29th. If Titlow wanted to withdraw her plea, as the record suggests, then she needed to make a decision before she had to testify in Rogers's trial. So on November 29th, Toca, having represented Titlow for only three days (formally substituting as counsel that day), moved to withdraw Titlow's plea. With such a short time frame, Toca's decision to move to withdraw the plea without reviewing the case file seems reasonable.

Second, Titlow has not overcome the strong presumption that Toca exercised reasonable professional judgment during his representation. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Although "failure to provide professional guidance to a defendant regarding his sentence exposure prior to a plea may constitute deficient assistance," *Moss v.*

United States, 323 F.3d 445, 474 (6th Cir. 2003), there is nothing in the record showing that Toca failed to so advise Titlow. She has not presented any evidence that she lacked any information when she made the decision to withdraw her plea. Rather, Titlow affirmed at the change of plea hearing that she was aware that withdrawing her plea to manslaughter subjected her to a potential life sentence for first degree murder. The burden is on the defendant to present evidence establishing that counsel was ineffective, and the defendant's chance of success does not rest on the government's or counsel's ability to refute the claim of ineffectiveness, as the majority suggests. *See Strickland*, 466 U.S. at 687; *Short*, 471 F.3d at 692 ("[D]efendants alleging ineffective assistance of counsel bear a heavy burden of proof." (internal quotation marks omitted)). Titlow has simply not presented any evidence that Toca gave her deficient advice. Instead, she argues that Toca's motion to withdraw the plea was a "reckless roll of the dice." But "[a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Although Toca did not pick up the file before moving for the plea withdrawal, Titlow has not explained how the file would have undermined the reasonableness of the plea withdrawal and, therefore, has not overcome the strong presumption of reasonableness.

The majority cites *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), as a case involving a "similar constitutional violation" without recognizing the crucial distinction between that case and this one—that the petitioner in *Lafler* presented actual evidence that he received

deficient advice. Specifically, both the petitioner and his former counsel testified at a *Michigan v. Ginther*, 212 N.W.2d 922 (1973), hearing, and their testimonies established that counsel had informed the petitioner of an incorrect legal rule that caused the petitioner to reject a plea offer. Titlow has not presented any similar evidence, as she did not have a *Ginther* hearing. Unlike *Lafler*, this case offers absolutely no evidence from which we can discern that Titlow received deficient advice. As the majority recognizes, "the record contains no details about Toca's conversations with Titlow" before the change of plea hearing. Without evidence that Toca gave incorrect advice or evidence that he failed to give material advice, Titlow cannot establish that his performance was deficient.

Although I would not reach the *Lafler* question because I do not believe that Titlow has established that her counsel was deficient, I cannot agree with the majority's description of *Lafler*'s requirements of the trial court during its reconsideration of the plea offer. *Lafler* does not, as the majority states, *require* the trial court to consult the plea agreement; it simply says that the "baseline" of the original plea offer "can be consulted in finding a remedy." *Lafler*, 132 S. Ct. at 1389. *Lafler* also does not require the trial court to resentence Titlow. Instead, *Lafler* states that once the prosecution reoffers the plea proposal, "the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." *Id.* Moreover, it is not the trial court's responsibility, as the majority states, to "fashion a sentence for Titlow that . . . remedies the violation of her constitutional right," as the remedy for the violation is the government's reoffering of the

original plea agreement. *See id.* ("In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal . . . ."). *Lafler* does not impose such requirements on the trial court, and the majority's statements to the contrary are incorrect.

The record does not establish that Toca was the reason Titlow withdrew her plea. Nor does it establish that his performance fell below an objective standard of reasonableness. Accordingly, the Michigan Court of Appeals's denial of Titlow's ineffective assistance claim was reasonable and, therefore, I must respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 10-2488

FILED
May 22, 2012
LEONARD GREEN,
Clerk

VONLEE NICOLE TITLOW,
Petitioner- Appellant,

v.

SHERRY L. BURT, Warden,
Respondent- Appellee.

Before: BATCHELDER, Chief Judge; CLAY and GILMAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED. IT IS FURTHER ORDERED that the petition for a writ of habeas corpus is conditionally GRANTED, giving the State 90 days to reoffer Titlow the original plea agreement or, failing that, to release her.

ENTERED BY ORDER OF THE COURT
Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VONLEE NICOLE TITLOW, # 384878,
Petitioner,

v. Case Number: 07-CV-13614
Honorable Marianne O. Battani

S.L. BURT,
Respondent.
_____/

OPINION AND ORDER (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS, (2) ISSUING A CERTIFICATE OF APPEALABILITY, AND (3) GRANTING AN APPLICATION FOR LEAVE TO PROCEED ON APPEAL *IN FORMA PAUPERIS*

I. INTRODUCTION

Pending before the Court is Petitioner Vonlee Nicole Titlow's[1] petition for writ of habeas corpus, filed under 28 U.S.C. § 2254. (Dkt. #1). Petitioner is a state inmate currently incarcerated at the Bellamy Creek Correctional Facility[2] in Ionia, Michigan. On March 20,

---

[1] Petitioner took on the appearance of a woman and preferred to be called "Nicole." According to the Michigan Department of Corrections website, she is incarcerated at a male facility and is listed as a male. However, her appearance is that of a woman. At trial, witnesses used a combination of male and female pronouns when referring to Petitioner. Accordingly, some quotations from the trial record refer to Petitioner as a female. This opinion will refer to Petitioner as a female.

[2] At the time Petitioner filed her habeas petition, she was incarcerated at the Southern Michigan Correctional Facility in Jackson, Michigan. The proper respondent in a habeas case is the habeas petitioner's custodian, which in the case of an incarcerated

2002, Petitioner was convicted of one count of aiding and abetting a second-degree murder,[3] by an Oakland County, Michigan, Circuit Court jury. On April 17, 2002, she was sentenced to a prison term of twenty to forty years for that conviction. In her *pro se* pleadings, Petitioner challenges her conviction and sentence on the following grounds: (1) her trial counsel was ineffective in advising her to withdraw her plea, in representing her when there was a conflict of interest, in failing to impeach the prosecution's star witness, in failing to object to the prosecutor's misconduct, in failing to object to the jury instructions, and in failing to request an abandonment jury instruction, (2) prosecutorial misconduct, (3) the trial court erred in failing to respond to a deliberating juror's question of law, (4) the trial court erred in giving an improper jury instruction which shifted the burden of proof, (5) there was insufficient evidence, (6) abuse of discretion by the trial court in failing to suppress evidence of a tainted photograph line-up, (7) her sentence was unconstitutional, and (8) her appellate counsel was ineffective. For the reasons stated below, the Court will deny the petition. The Court, however, will issue Petitioner a certificate of appealability and will grant her an application for leave to proceed on appeal *in forma pauperis*.

---

petitioner is the warden of the facility where the petitioner is incarcerated. Rule 2(a) of the Rule Governing § 2254 Cases; *see also Edwards v. Johns*, 450 F.Supp.2d 755, 757 (E.D. Mich. 2006). In most cases where a petitioner is transferred to a different facility after the petition has been filed, the Court would order an amendment of the case caption. However, because the Court is denying the petition in this case, it finds no reason to do so.

[3] MICH. COMP. LAWS § 750.317.

II. BACKGROUND

Petitioner's troubles in this case arise from an incident which occurred on August 19, 2000, resulting in the death of her uncle, Donald Rogers. According to the prosecution's theory, Petitioner agreed to help her aunt, Billie Rogers, kill Donald so that Billie could inherit Donald's estate. Petitioner planned to pay for a sex-change operation with a share of the proceeds.

Trial began on March 11, 2002, and lasted seven days. Troy Police Officer Lynn Giorgi testified first.

According to Officer Giorgi, on August 12, 2000, at 4:25 a.m. she was dispatched to 2090 Grenadier Street in Troy, Michigan, regarding a man who was unconscious and not breathing. Officer Giorgi and Officer Pete Dungjen arrived at the same time. When the officers arrived, two women met them at the door and were standing in the foyer. One woman was Billie Rogers, the decedent's wife, and the other was Petitioner. The officers were directed into the kitchen where they found Donald Rogers on the floor. A plastic glass was near his left hand. There was no fluid on the ground and it did not smell of alcohol. An over-turned chair was also by his head.

Officer Giorgi testified that she had to move the chair slightly to reach Mr. Rogers. The sink in the kitchen was not far from his body. She said Mr. Rogers's legs were crossed. It was clear to both officers that he was dead.

Officer Giorgi further testified that she did not see any signs of trauma, such as blood. As for Mr. Rogers's

facial marks, she did not believe them to be unusual at the time.

According to Officer Giorgio, they then went to talk to Billie Rogers to get Mr. Rogers's medical history. She said Billie Rogers was very calm and chain-smoking cigarettes. She initially thought that Billie was in shock because she did not ask any questions and, when offered the opportunity to call family, she declined. When asked to explain what had happened, Billie told the police that she and Petitioner had gone to the casino without Mr. Rogers and, when they returned, they found him on the floor. Billie said they entered the house through the garage door entrance. Billie told the officers that her husband was an alcoholic.

Billie also told the officers that Donald had previously passed out and hit his head on the bathtub. Billie said he refused medical treatment. She also said he suffered from rectal bleeding, and showed them a chair with dried bloodstains.

Officer Giorgio testified that Petitioner was very upset. She said Petitioner was yelling and swearing at her, saying, "you know, he's just dead." Trial Tr. vol. II, 56, Mar.12, 2002. Petitioner accused the officer of being rude. Petitioner did not appear drunk to the officer.

Officer Giorgi gave Billie and Petitioner written statements to fill out. Petitioner did not want to make a statement. Petitioner began writing a statement, but then put down the pen and asked why it was necessary. Petitioner then provided the officers with a short written statement. That statement was admitted into evidence.

Officer Giorgi did not see any liquor bottles, other than those placed on the shelves behind the bar in the family room and in the pantry in the kitchen. The bottles in the pantry were sealed. She said the house was neat.

Officer Pete Dungjen also testified. He said he was a licensed emergency medical technician and was dispatched that day for an unexpected death at 2090 Grenadier Street. He said he was met at the house by Petitioner and Billie Rogers. According to Officer Dungjen, Billie told them, "he's lying in there," and motioned toward the kitchen. Trial Tr. vol. II, 113, Mar. 12, 2002. He said both women were calm.

Officer Dungjen testified that he believed that Mr. Rogers had been dead for some time because his body was cold. He said he saw fluid in the cracks on the floor, believing that it was from a glass near Mr. Rogers's hand.

Officer Dungjen further testified that he remained with the paramedics, while Officer Giorgi went to talk to Petitioner and Billie. He said, even though he was in another room, he heard Petitioner yelling at Officer Giorgi. He said Petitioner did not appear drunk, but it was his opinion that Petitioner's behavior was unusual. He said Billie remained calm.

Billie Rogers told Officer Dungjen that her husband was an alcoholic, who drank one to two gallons of alcohol a day. Officer Dungjen saw a glass next to the coffee table in the family room and a plastic glass by Mr. Rogers's hand. There was also a pair of women's shoes by the couch. The glass had a clear liquid in it. Bottles of alcohol were set up behind the

bar and in the pantry. One bottle in the pantry was one-quarter to one-half full.

Officer Dungjen testified that Billie told him that the glass and the shoes by the couch in the family room belonged to her. She also told him what she had told Officer Giorgi; that they came in through the garage entrance and that she had gone to get a glass of water. Officer Dungjen assumed that she got the glass of water from the kitchen. She said, after she returned to the family room, she got up again, went into the kitchen and found her husband.

Officer Dungjen said he did not believe that Billie would not have seen her husband earlier because his body was visible from the family-room entrance as well as from the sink area in the kitchen. He also believed that the position of Mr. Rogers's body was unusual in that his legs were crossed at the ankles and under the table. Because of the over-turned chair, Officer Dungjen believed that Mr. Rogers's body should have been on its side rather than on its back.

Community EMS employee Jeffrey Berryhill testified next. He said, once he arrived at the scene, he was informed that someone had died. According to Berryhill, Mr. Rogers's body displayed lividity and rigor mortis. He said it took twenty minutes to one hour for rigor mortis to set in. Mr. Rogers was pronounced dead at 4:50 a.m.

Berryhill testified that Petitioner and Billie Rogers's reactions were unusual. He also found Mr. Rogers's body position unusual. He said, if Mr. Rogers had fallen, then it would have been unusual for him to end up with his legs crossed. He also would have

expected to see more trauma to Mr. Rogers's body if he had fallen.

Danny Chahine testified next. He said he met Petitioner at Motor City Casino in June 2000. Billie Rogers was with Petitioner when he met her. Chahine said he saw Petitioner at the casinos at least thirty times. On almost all of those occasions, Billie Rogers was with Petitioner. He said Petitioner lived with the Rogers.

Chahine testified that Petitioner told him that Mr. Rogers had ten million dollars. Petitioner also told Chahine that the Rogers's had an unhappy marriage.

Chahine further testified that, on August 12, 2000, he received a telephone call from Petitioner, telling him that Mr. Rogers died. Petitioner told Chahine that when she and Billie returned from the casino, they found Mr. Rogers dead on the kitchen floor.

Chahine said when he asked Petitioner how Mr. Rogers died, Petitioner, who was crying, said that the police came and asked too many questions. Chahine testified that he thought that unusual. Chahine asked Petitioner if she and Billie had done anything. Petitioner told him she would tell him everything later.

Petitioner had previously told Chahine that Billie wanted to get rid of her husband. Petitioner told him that Billie would pay $25,000 to get rid of him.

Chahine testified that, on one occasion, when he came to pick up Petitioner, the Rogers were fighting. When Chahine asked why, Petitioner told him that they were arguing over Billie's $13,000 credit card bill

(Billie's bill at the casino). Chahine testified that Petitioner told him many times that Billie wanted to get rid of her husband.

Petitioner told Chahine that Billie invited her (Petitioner) up from Tennessee to Michigan because she wanted to catch them in a compromising position and then use that information against her husband in a divorce because she did not want to lose the money.

Chahine testified that he believed that Petitioner was a woman, adding that he had a boyfriend-girlfriend relationship with her. He said they also had sex, twice, but he did not see anything which would have led him to believe that Petitioner was a man. The first time, Petitioner performed oral sex on him and she was topless. The second time, Chahine had sex with her from behind. Chahine testified that while it hurt him to testify against Petitioner, he had to tell the truth for Mr. Rogers's family and for himself, because he did not want to live with the knowledge that Petitioner and Billie had killed Mr. Rogers.

Chahine testified that, the day after Mr. Rogers died, Petitioner invited him to the house. Petitioner was crying a lot and showed Chahine where they had found his body. Chahine said Billie acted like nothing had happened.

Petitioner showed Chahine the suit that they were going to have Mr. Rogers wear. Petitioner told him that Billie wanted Mr. Rogers cremated as quickly as possible. Apparently the family did not want to let Billie do that; however, she (Billie Rogers) pushed for it and Mr. Rogers was allegedly cremated.

Petitioner and Billie gave Chahine what they called "sex tapes" and they claimed that Mr. Rogers had watched them. Originally they were going to throw the tapes away, but he asked to look at them. When he watched the tapes, he did not see anything sexual in nature. Rather, he saw Mr. Rogers and his children playing by the water.

Chahine testified that, the following day, Chahine and Petitioner met for dinner at the casino. Petitioner came with Billie. Petitioner told him that she wanted to treat him to dinner, which was unusual. Even though Billie was invited to dinner, she declined because she was playing the slot machines.

At dinner, Petitioner told Chahine that she and Billie had walked into the house, on the night in question, at around 3 a.m., and found Mr. Rogers passed out on the floor. She said Billie suggested they do what they had planned. Billie then got some vodka bottles and started pouring vodka in her husband's mouth. Petitioner told Chahine that one of them would then pinch his nose and the other one would put the vodka in his mouth. When Mr. Rogers gasped for air, Petitioner said she let him breath; she knew that Billie wanted to kill him, but Petitioner told Chahine that she couldn't do it. According to Petitioner, Mr. Rogers would not die and Billie told her that she had to help her and that she would pay $50,000.

Petitioner said Billie told her that they had to do it because in the morning Mr. Rogers would know that they had tried to kill him and that would be the end of Billie. Billie told Petitioner that she needed help to hold Mr. Rogers down. Billie then got a pillow and put it on her husband's face.

Petitioner told Chahine that Billie told the family that she and Petitioner came back from the casino at 11 p.m., but that she (Petitioner) told the police that it was 3 a.m. Petitioner told Chahine that she believed that was what caused the police to investigate. Petitioner told Chahine that they had thrown the pillow and vodka bottle onto the freeway.

Chahine testified that Petitioner added that she also had to tell him the truth about something else. She then told him that she was not a woman, but a man. Chahine asked Petitioner to "show him" because he did not believe it. They went to the parking lot, got in the car and Petitioner told him the same story. Chahine asked Petitioner why she was telling him the story because if it ended up in court he would have to testify. Petitioner stated that no one would believe Chahine because he (Chahine) had a record and was a foreigner while she (Petitioner) and Billie were white women with no records.

Chahine admitted that, in 1987, he had been arrested for possession of cocaine, but the charge was dismissed. He also pleaded guilty to possession of cocaine in 1989. He denied using cocaine.

In between those charges, Chahine said he filled out a citizenship form and answered negatively when asked if he had been arrested and convicted of a crime. He said he then pleaded guilty to falsely answering a citizenship application because of his misunderstanding about the question asked and his fear of being deported to Lebanon. He was placed on probation for two years; the probationary period expired.

Chahine said he and Petitioner then went back into the casino. Petitioner asked Billie for $700. Billie took out a checkbook with $100,000 written in it. Twenty thousand had been deducted and Billie subtracted another $700. Chahine identified the checkbook in court.

According to Chahine, one of Billie's daughters told her (Billie) that she should give Petitioner $100,000 because she knew what they had done and that Petitioner should be paid more than $50,000.

After thinking about what Petitioner told him for one week, Chahine called a friend who was a police officer in Bloomfield Township. He asked him if he thought there was any need for him to talk to the Troy police. Chahine was put in contact with Detective Tullock, who asked if he would wear a wire. Chahine agreed.

After Petitioner called to arrange for a dinner, Chahine had the wire hooked up. The tape was recorded on September 1, 2000. It was admitted at trial and played for the jury.

On the tape, Petitioner made some comments about Chahine being an alibi for them. Petitioner had previously asked Chahine to be their alibi but he declined.

Chahine testified that, after Mr. Rogers died, Billie bought Petitioner a new car. Billie also bought herself a black Cadillac within days of her husband's death. Petitioner also showed Chahine a deposit slip for $60,000.

Chahine said Petitioner told him that, while smothering Mr. Rogers, he had played with her breasts. She told Chahine she thought he died happy because he was fondling her breasts. Petitioner said Mr. Rogers's death was a mercy killing. She said she would use the money from Billie for a sex-change operation.

Because Chahine was aware he was taping Petitioner, he said he was emotional. He said Petitioner asked him several times if was taping their conversation. Chahine said he denied taping the conversation. He told Petitioner he would not blackmail them.

Oakland County Medical Examiner Ljubisa Jovan Dragovic testified that, at 5:11 a.m. on August 12, 2000, his office was contacted by Officer Dungjen and told about Mr. Rogers's death. Robert Allegrina, a former police officer, who worked as an investigator, went to the scene. Mr. Rogers's body was then taken to the medical examiner's office. No autopsy was performed; however, Deputy Oakland County Medical Examiner Dr. Ortiz-Reyes viewed the body and took some samples for toxicology. Dr. Ortiz-Reyes originally indicated that the cause of death was a heart attack. The cause of death was determined on the basis of a statistical inference from information received during the investigation. Mr. Rogers's body was released on August 12, 2000, to a funeral home with authorization from Billie.

On August 14, 2000, the findings came back from toxicology; Mr. Rogers's blood alcohol level was .44 and his urine alcohol level was .47. Dr. Dragovic said such a level would be lethal to someone who was not used to

drinking. He testified that, to reach that level of intoxication, a person would have to drink a fifth and one-half or two fifths. Given that Mr. Rogers was reportedly an alcoholic, Dr. Dragovic opined that that level was not lethal for him.

Upon receiving the toxicology results, Dr. Ortiz-Reyes added acute alcohol intoxication as the cause of death with arterial sclerotic cardiovascular disease as a contributing factor. No further examination of the body was done because Dr. Ortiz-Reyes believed that Mr. Rogers had already been cremated, although mistakenly.

Dr. Dragovic further testified that normally urine alcohol levels were thirty percent higher than blood alcohol levels. The difference between the two levels indicated that something interceded to prevent further absorption of alcohol as well as the fact that there was loading of alcohol into Mr. Rogers. He testified that death was a factor which could accomplish that result. When someone died of acute alcohol intoxication, there would be foamy watery fluid escaping from the mouth and nose.

Dr. Dragovic testified that after Dr. Ortiz-Reyes's examination, he was in contact with the police regarding the investigation of a claim that Mr. Rogers was smothered. Upon reviewing the photographs, Dr. Dragovic thought that it was strange that there was no obvious sign of trauma because the floor on which Mr. Rogers had allegedly fallen was hard marble. He also noted that Mr. Rogers's black eye was a healing injury, at least two days old, and not caused by a fall. He also thought it unusual that Mr. Rogers's legs were crossed.

According to Dr. Dragovic, the scene did not "make any sense." Trial Tr. vol. III, 207, Mar. 14, 2002.

Upon reviewing enlargements of the pictures at the scene, Dr. Dragovic noticed fine scrapes on the left part of the nose, the tip of the nose, the upper border of the lip and the upper and lower left eyelids, which were obscured by the earlier eye injury. He opined that those injuries were the result of contact with a rougher surface and friction and that the rougher surface could be a pillow with a weave. Dr. Dragovic believed that those injuries had to have occurred while Mr. Rogers was alive because of the color of the scrapes. Dr. Dragovic testified that smothering might or might not leave a mark on a victim's body depending on the victim's ability to defend and the material used. He explained that in the early nineteenth century, there was a pair of grave robbers named Burke and Hare. They realized that they could provide fresher bodies to medical schools for research by taking people who were intoxicated and suffocating them because they could not resist. That became known as burking. The types of marks on Mr. Rogers's body were an example of "burking." Trial Tr. vol. IV, 49, Mar. 15, 2002.

On December 5, 2000, Dr. Dragovic issued an affidavit to correct the death certificate to reflect that the cause of Mr. Rogers's death was asphyxia by smothering, with acute alcohol intoxication as a contributing factor. The manner of death was homicide.

Troy Police Detective Donald Bullock testified that, on August 30, 2000, he was called by a Bloomfield Township officer and told about Chahine. Chahine went in for an interview. The next day, Chahine was outfitted with a recording device. Neither Detective

Tullock nor the Oakland County Prosecutor's office ever offered Chahine anything for his testimony.

Troy Police Detective Donald Zimmerman testified that he executed a search warrant for Billie Rogers's house on January 6, 2001. Pursuant to the warrant, Billie gave Detective Zimmerman two checkbooks. One of the checkbooks was the one that was identified by Chahine. In the back of that checkbook was Petitioner's name with the notation "100,000." Underneath the "100,000" appeared the numbers "70,260" and "700." The number "70,260" was the amount of the check Billie had written to Petitioner to buy a certificate of deposit and open a savings and checking account. The checkbook also showed a notation for "$19,838," the approximate cost of Petitioner's car.

Chicago Police Detective John Griffin testified that on January 4, 2001, he assisted in Petitioner's arrest. At that time, Petitioner had an apartment in Chicago. Upon hearing that she was being arrested for Mr. Rogers's murder, Petitioner stated, "[W]here's my aunt? Is my aunt under arrest too?" Trial Tr. vol. IV, 9, Mar. 15, 2002.

Amy Mouradian testified that she was an operations consultant for Bank One. Her review of bank records revealed the following: Billie Rogers wrote a check for $50,576.00 to Suburban Olds Cadillac on August 21, 2000. On August 24, 2000, she wrote a check for $19,837.30 to Suburban Olds Cadillac. On that same date, she had $100,000.00 transferred to her Bank One account and wrote Petitioner a check for $70.260.00. On August 25, 2000, Petitioner opened a certificate of deposit account with the money and then

withdrew $5,000.00 to put in a savings account and $4,000.00 to put in a checking account.

Randall Pangretic, a manager at Merrill Lynch in Bloomfield Hills, said a review of Mr. Rogers's accounts showed they were worth $1,778,603.00, on August 31, 2000, with Billie as beneficiary. On August 24, 2000, she transferred $100,000.00 from one of the accounts.

Paul Livernois, a salesperson for Suburban Oldsmobile Cadillac, testified that, on August 17, 2000, Billie bought a 2000 Cadillac Seville to be delivered or picked up on August 21. Petitioner bought a 1997 Buick Riviera on August 21 when she was there with Billie. Petitioner picked up the Buick Riviera (paid for by Billie) on August 24.

Attorney Donald McGinnis testified that he prepared Mr. Rogers's will and that Billie was the sole beneficiary of his estate.

The parties stipulated that Billie had given her daughter and future son-in-law $250,000 for a business and bought a $108,000 house for her mother, paid for in cash, after her husband's death.

Robert Allegrina, an investigator with the Oakland County Medical Examiner's Office for thirteen years, arrived at the scene at 6:10 a.m. Billie told him she was not opposed to an autopsy. He was aware of Officer Dungjen's suspicions regarding the placement of the body.

Dr. Bader-Cassin, the medical examiner for Washtenaw and Livingston counties, testified for the defense. He said Mr. Rogers died of acute alcohol

intoxication. According to Dr. Bader-Cassin, a .44 blood alcohol level was a lethal level. He said a chronic alcoholic was more likely to be compromised at that level. He said the difference between the blood alcohol level and the urine alcohol level only indicated that Mr. Rogers had been drinking over a prolonged period of time. Any alcohol which might have been poured down Mr. Rogers's throat or in his nose would have been negligible because he had already reached a fatal blood alcohol level.

Upon viewing the photographs, Dr. Bader-Cassin testified that the scene did not look staged. However, Dr. Bader-Cassin agreed that if Mr. Rogers fell dead from the chair in the picture, he would not have fallen in the position in the photograph. While Dr. Bader-Cassin saw bruises on Mr. Rogers's face, he could not say what they were or how they got there. Dr. Bader-Cassin admitted that he could not rule out smothering as a cause of death. He also agreed that with "burking" there might be very little or no evidence left behind. Dr. Bader-Cassin also agreed that if Mr. Rogers was unconscious from alcohol, then depriving him of oxygen could further injure his body.

Petitioner testified. She said her name was Harry Vonlee Titlow, but she changed it to Nicole Vonlee Titlow when she was eighteen. She said she was a nail technician and worked as an escort. She said she could earn $2,000 or $3,000 a week escorting. She said she ran an escort service in Denver and Chicago. She denied being a pimp.

Petitioner testified that she was drinking heavily, even though she was going to Alcoholics Anonymous (AA). She said she decided to move to Tennessee with

her grandmother and start over. She said she was working at the Waffle House and going to AA meetings.

Petitioner testified that she was having a hard time because she did not have a car. According to Petitioner, Billie sold her a car. She said Billie asked if she would like to gamble with her in North Carolina and Petitioner agreed to do so. She said she and Billie met on the 4th of July weekend in 2000 and Billie's car was stolen. She said when the car was recovered it was damaged and Billie arranged to have her drive her to Michigan.

According to Petitioner, Billie told her that she and Donald had the perfect marriage because he did not care how much money she spent or how much she stayed away from home. Petitioner said Billie and Donald argued about Billie's gambling debt.

Petitioner further testified that, on the weekend of July 11, 2000, Billie had to go to California because her son was in a serious car accident. According to Petitioner, Billie suggested that her husband take Petitioner out to dinner for her birthday. Petitioner said Donald drank before they went out. She said Donald kept his vodka in the freezer. During dinner, Donald drank more and then passed out.

Petitioner testified that she got Donald home and they went to their separate beds. However, sometime later when Petitioner woke up, Donald was in bed with her. Petitioner said Donald was grabbing her breasts. She asked Donald what he was doing and then told him that Billie would kill him if she caught him. She then went downstairs and slept on the couch.

Petitioner testified that, the following morning, Donald had a cut and bled extensively. Petitioner said that is when he got the black eye.

Petitioner testified that she and Billie went to Tennessee so Billie could get her car. Petitioner said she was going to stay in Tennessee even though she had met Chahine and liked him enough to want to continue their relationship. Petitioner said Billie was upset by that and wanted Petitioner to come back with her. Petitioner agreed to go back to Michigan with Billie.

According to Petitioner, Donald would make passes at her. She said she told Billie about what Donald was doing. Petitioner said Billie then caught Donald. Petitioner testified that Billie told Donald that he should be ashamed of himself and added, "[I]f you try to divorce me, . . . I'll have something on you." Trial Tr. vol. V, 109, Mar. 18, 2002.

Petitioner further testified that Donald would fall. He would say: "I think Billie put these floors in here, she's trying to kill me." Trial Tr. vol. V, 110, Mar. 18, 2002. Billie responded: "[Y]eah, next time I'll just spend $25,000 and hire somebody." Trial Tr. vol. V, 110, 175, 188, Mar. 18, 2002. Petitioner said Donald drank every day and was visibly intoxicated.

Petitioner denied telling Chahine that Donald died happy because he played with her breasts. She said she told Chahine that he was a transsexual the first week she met him. She said Chahine took her to his jewelry store. He gave her a bracelet for her birthday and also gave her a ring, on the condition that she marry him.

She said when they had sex, she was naked, but he never made any comments.

Petitioner testified that, on August 11, 2000, Chahine took her home after she spent the night at his house. She said she and Billie cleaned the house and Donald went to work, as he did every day. Donald would leave at 4 or 5 a.m. and come home at 3:30 or 4 p.m. Petitioner said Donald came home and ate that day. She said she did not eat because she had been drinking. She and the Rogers were supposed to go to the race track but did not because Donald was drunk.

Petitioner further testified that she and Billie were in the living room when they heard Donald fall. Petitioner said she went into the kitchen and found Donald passed out, with the chair on the floor. She said she then went to check on some pants she had in the dryer. She said when she came back she asked Billie about getting Donald up off of the floor. Billie told her to hold Donald's mouth and nose closed and he would wake up. She said she refused to do so. She said she thereafter agreed to hold Donald's mouth if Billie held his nose. Petitioner testified that she kept her fingers spread apart and thought that Billie was joking.

Petitioner said Billie grabbed a vodka bottle and poured some vodka in Donald's mouth. She said Donald spit it out. She told Billie to leave him alone, but Billie told her to pour the vodka down his mouth; she poured a little bit in his mouth. She said Billie grabbed the bottle and poured vodka in Donald's nose; he shook his head. She thought Billie was hurting Donald. She took the bottle away and told Billie that she was hurting him and to stop wasting the vodka.

Petitioner testified that she made a drink, telling Billie that they should go to the casino and let Donald sleep until they got back. According to Petitioner, she then went to the bathroom to get ready. Petitioner said when she came back into the kitchen, she found Billie holding a pillow over Donald's face. She said she told the police that the pillow was from a couch in the family room and that it had a rough texture.

Petitioner said she asked Billie, "[W]hat the fuck are you doing?" Trial Tr. vol. V, 141, Mar.18, 2002. According to Petitioner, Billie removed the pillow and said she had to do it because he would know what had happened earlier. Petitioner denied holding Donald down.

Petitioner said she checked to see if Donald was breathing and told Billie that she was going to call 9-1-1. Petitioner said Billie told her to calm down. She said Billie offered her $25,000, but she declined. Billie told her she would make it $50,000, but she still declined.

Billie told Petitioner if she called 9-1-1, she would tell the authorities that she had more to do with Donald's death. Petitioner said she was afraid to call 9-1-1.

Petitioner testified that Billie told her that they would go to the casino and when they got back, Billie would then call 9-1-1 and tell them that they found Donald on the floor not breathing. She denied asking Chahine to be her alibi. She testified that Billie talked about it, but then decided that he (Chahine) would try to blackmail them.

Petitioner said she and Billie went to the casino and returned home at 3:30 a.m. She said Billie threw away the pillow, but she did not remember if she threw away the bottle. She could not recall if she told the police that she might have thrown out the pillow.

According to Petitioner, once home, Billie called 9-1-1. She admitted to being loud and aggressive with the police, because she was worried Billie would tell the police.

Petitioner testified that, after everyone left, Billie began yelling at her. She said she responded that she did not want to lie. Petitioner said Billie told her "[W]ell, why do you care? You're getting $50,000 for lying." Trial Tr. vol. V, 149, Mar.18, 2002. She told Billie that she did not want the money. Petitioner said she lied to the police, not for the money, but because she did not want to see Billie die in prison.

Petitioner testified that she was drinking heavily thereafter. She said she did not get out of bed for three days because she was praying, reading the Bible, and drinking.

Petitioner further testified that she first saw Chahine after he and Billie went to the Kingsley Inn. Petitioner said she went to a doctor, who prescribed an anti-anxiety drug. According to Petitioner, the doctor told Petitioner to stop drinking. Petitioner said, after she began taking the drug, she drank less because she was calmer.

Petitioner testified that she arranged to treat Chahine to dinner. She told him she had something important to tell him and that he thought she was

going to accept his marriage proposal. Petitioner told Chahine that he could not legally marry her because she was a man. He was upset. Because he was so upset, Petitioner suggested they go and talk in the car. According to Petitioner, Chahine was more concerned that she was not going to marry him than anything else. She said she then went home with him and they had sex.

Petitioner testified that Billie got a room at the Kingsley Inn because she (Petitioner) could not stand to be in the house. Petitioner testified that she told Billie's daughter what had happened. Billie's daughter told her that Billie would pay her $100,000 and she would have to keep her mouth shut. She took the money and car so she could get away from Billie.

Petitioner testified that she told her mother what had happened. Billie threatened Petitioner's mother, telling her that she would make sure that Petitioner got in trouble. Billie added that she had money, so, she would not spend even one day in jail.

Petitioner said she gave most of the money away and never planned to use it for a sex-change operation. She admitted she paid her bills with the money. She also admitted she may have told the police that Billie gave her $10,000 in cash when she bought her Cadillac.

Detective Zimmerman was the prosecution's rebuttal witness. He said Petitioner told the police that Billie had mentioned having Donald killed for $25,000. In her statement to him, she said she told Billie about a hit man she knew in Denver, but it would cost more than $25,000.

Detective Zimmerman said Petitioner told the police that Billie offered her $25,000 before she poured the vodka in Donald's mouth. Petitioner also told the police that Billie had made a motion indicating that she should smother Donald and that Billie said "do it." Trial Tr. vol. V, 219, Mar. 18, 2002.

Petitioner told the police Billie had given her $10,000 in cash after the murder. She said she got Billie to give her all the money after Billie had bought the Cadillac. Petitioner told the police on a different occasion that it was her idea to wake up Donald by holding his nose.

The jury found Petitioner guilty.

On May 14, 2002, Petitioner filed her direct appeal with the Michigan Court of Appeals. On November 21, 2002, she filed a motion for remand, which was denied in an order dated January 9, 2003. *People v. Titlow*, No. 241285 (Mich.Ct.App. Jan. 9, 2003).

On November 25, 2002, Petitioner filed her brief with the Court of Appeals raising the following claims: (1) trial counsel was ineffective in advising her to withdraw her guilty plea to manslaughter, in failing to impeach the prosecution's star witness, in failing to object to prosecutorial misconduct, and in failing to object to the jury instructions and asking for an abandonment instruction; (2) prosecutorial misconduct, where the prosecutor vouched for the credibility of a witness, shifted the burden of proof, denigrated counsel, violated her right to remain silent, argued facts not in evidence, and pursued her prosecution knowing that she passed a polygraph test; (3) the jury was improperly instructed; and (4) cumulative errors.

In an unpublished opinion, dated December 11, 2003, the Court of Appeals affirmed Petitioner's conviction and sentence. *People v. Titlow*, No. 241285, 2003 WL 22928815 (Mich.Ct.App. Dec. 11, 2003).

Petitioner then filed an application for leave to appeal that decision with the Michigan Supreme Court, raising the same claims. On May 28, 2004, the Michigan Supreme Court denied Petitioner's application. *People v. Titlow*, 470 Mich. 867, 680 N.W.2d 900 (2004).

On August 22, 2005, Petitioner filed a motion for relief from judgment, under Mich.Ct.R. 6.500 *et. seq.*, with the trial court. In that motion, Petitioner raised the following claims:

> I. [Petitioner's] sentence is unconstitutional under the United States Supreme Court's decisions of *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005) and a resentencing is required.
>
> II. [Petitioner] was denied a fair trial and due process of law where (a) the state trial court, over objection, gave the jury the option to convict [Petitioner] under a second-degree murder theory that "inaction or non-action to stop or prevent a crime" constitutes second-degree murder where such a verdict impermissible as that crime is defined under Michigan law; and (b) the jury option of finding guilt under a [sic] "inaction or non-action" theory shifted the burden of proof.

> III. [Petitioner] was denied a fair trial and due process of law where there was insufficient evidence to show that she knowingly failed to act to stop or prevent the homicide with knowledge that death or great bodily harm would follow her failure to act to stop or prevent the crime and the remedy is to reduce the charge to accessory after the fact to second-degree murder.
>
> IV. [Petitioner] Titlow was denied the effective assistance of counsel at trial.
>
> V.]Petitioner] Titlow was denied effective assistance of appellate counsel and counsel's performance establishes good cause for bringing the post-appeal motion for relief from judgment.

In an order entered on November 9, 2005, the trial court denied Petitioner's motion. *People v. Titlow*, No. 01-177745-FC (Oakland County Circuit Court, Nov. 9, 2005).

Petitioner filed an application for leave to appeal the trial court's decision with the Michigan Court of Appeals, raising the same claims raised in her motion for relief from judgment. The application was denied because she "failed to meet the burden of establishing relief under MCR 6.508(D)." *People v. Titlow*, No. 273274 (Mich.Ct.App. Apr. 27, 2007). Petitioner filed an application for leave to appeal that decision with the Michigan Supreme Court, which was denied for the same reason. *People v. Titlow*, 480 Mich. 890, 738 N.W.2d 715 (2007).

Petitioner filed the pending habeas action with this Court on August 28, 2007.

III. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs this Court's habeas review of state-court decisions. Under the AEDPA, a federal court's review of a habeas proceeding is limited. A federal court may not grant a writ of habeas corpus unless the state adjudication on the merits either:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the State court proceedings.

28 U.S.C. § 2254(d).

The Supreme Court clarified that standard in *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000):

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state

> court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

With that standard in mind, the Court proceeds to address Petitioner's claims.

IV. DISCUSSION

A. Ineffective Assistance of Counsel Regarding Guilty Plea and Media Rights

In her first habeas issue, Petitioner argues that she was denied the effective assistance of counsel when her second attorney recommended that she withdraw her guilty plea to manslaughter, which resulted in a trial verdict on the higher offense of second-degree murder. She also argues that the attorney had a conflict of interest when rendering that advice because his law firm had obtained the media rights to her story.

The Michigan Court of Appeals, in addressing these issues, stated:

> A. Withdrawal of Guilty Plea
>
> When a defendant pleads guilty, he must be prepared to admit the elements of the offense. The record discloses that the second attorney's advice was set in motion by defendant's statement to a sheriff's deputy that he did not commit the offense. Defendant offers the affidavit of his first attorney, who negotiated a plea agreement that he thought was in defendant's best interests. When a defendant

> proclaims his innocence, however, it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty–no matter how "good" the deal may appear. We therefore reject defendant's argument that his second attorney gave him "grossly erroneous advice." On the proofs and arguments offered by defendant, defendant has failed to demonstrate that his second attorney's advice to withdraw his plea fell below an objective standard of reasonableness.
>
> B. Conflict of Interest
>
> We now turn to defendant's allegation that his second attorney acquired an improper interest under MRPC 1.8. Although the type of memorable or "juicy" story that sells books or movies may conflict with a defendant's best interests at trial, in this case defendant's second attorney withdrew before any harm could potentially be done. Defendant has not demonstrated that any impropriety by counsel deprived him of the effective assistance of counsel.

Titlow, 2003 WL 22928815, at * 2 (footnotes and citations omitted).

Petitioner has not shown that the Michigan Court of Appeals's decision regarding this claim is contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court or an unreasonable determination of the facts. Rather, she simply reargues the claims made before the Court of Appeals and states in conclusory fashion

that the state court's ruling was contrary to, or an unreasonable application of, Supreme Court precedent. The function of this Court on habeas review is not to act as if it were an appellate court reviewing the actions of the trial court on direct appeal. Rather, the function of this Court on habeas review is much more limited and, at the same time, much more deferential.

First, in order to establish ineffective assistance of counsel, it must be shown that counsel's performance was deficient and that the deficient performance prejudiced the defense so as to render the trial unfair and the result unreliable. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

With respect to the performance prong of the *Strickland* test, a petitioner must identify acts that were "outside the wide range of professionally competent assistance" in order to prove deficient performance. *Strickland*, 466 U.S. at 690. The reviewing court's scrutiny of counsel's performance is highly deferential. *Id.* at 689. The court must recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690.

To satisfy the prejudice prong under *Strickland*, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.* "On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the

proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." *McQueen v. Scroggy*, 99 F.3d 1302, 1311-12 (6th Cir. 1996) (quoting *Strickland*, 466 U.S. at 686). *See also Wickline v. Marshall*, 319 F.3d 813, 819 (6th Cir. 2003), *cert. denied*, 540 U.S. 955 (2003).

Here, the Michigan Court of Appeals applied *Strickland* to the facts of this case. Petitioner may not agree with how the Court of Appeals did so, but mere disagreement with the state court's analysis is not sufficient to warrant habeas relief. As for its factual determinations (i.e. "the second attorney's advice was set in motion by defendant's statement to a sheriff's deputy that [s]he did not commit the offense"), Petitioner has not overcome the presumption of correctness of such factual determinations.

The Court of Appeals's finding that "interim counsel" was not ineffective is completely reasonable on the law and the facts. Counsel could not be ineffective by trying to negotiate a better plea agreement for Petitioner with Billie Rogers's trial imminent and Petitioner stating at the time that Billie Rogers had committed the murder without her assistance (in other words, that she was innocent). The related assertion that "interim counsel" was motivated by a fee agreement that involved counsel's acquisition of a book or media rights (something that interim counsel himself denied), does not per se render counsel ineffective. *Beets v. Collins*, 65 F.3d 1258, 1272-1273 (5th Cir. 1995), *cert. denied*, 517 U.S. 1157 (1996).

The Petitioner's desire to withdraw her plea (which itself was motivated by a belief in innocence) pre-dated interim counsel's involvement. Moreover, how can a

criminal defendant's counsel be ineffective for advising her to go to trial when she (the criminal defendant) claims to be innocent of the crime? Petitioner chose to go to trial and to take her chances with a jury. A jury convicted Petitioner of a charge greater than manslaughter, but lesser than first-degree murder. She may now regret that choice, but it is not a basis for granting federal-habeas relief.

Petitioner claims that due process is implicated herein by noting that the sheriff's deputy who stated that she should withdraw her plea was a state actor and because "interim counsel" was an officer of the court and, therefore, also acting on behalf of the state. That claim was reasonably rejected by the Court of Appeals. Petitioner has not shown that a contrary conclusion is compelled by Supreme Court precedent.

Against that backdrop, the Court concludes that Petitioner is not entitled to habeas relief regarding these claims.

B. Remaining Ineffective Assistance of Counsel Claims

Petitioner also alleges that she was denied her right to the effective assistance of counsel where counsel (1) failed to impeach the prosecution's star witness on material points, (2) brought out evidence which attacked her character, (3) failed to object to a jury instruction, and (4) failed to ask for an abandonment instruction.

The Michigan Court of Appeals also rejected these claims, stating:

A. Eliciting Damaging Testimony/Failure to Impeach

Defendant argues that trial counsel was ineffective when he elicited damaging information from the prosecution's main witness, Danny Chahine, and then failed to impeach Chahine with prior statements contradicting the damaging version. The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. A substantial defense is one which might have made a difference in the outcome of the trial.

During cross-examination of Chahine, counsel asked about defendant's statements describing how Donald was killed. Chahine had earlier testified that defendant put his hand over Donald's mouth, but kept a passage open so Donald could breathe. Meanwhile, Billie Rogers was offering increasing sums of money for defendant's cooperation, from $25,000 to $50,000. Counsel asked Chahine about defendant's actions as Billie went for a pillow to suffocate her husband:

> Q. But after you indicate that Billie is becoming frustrated and she makes the statement from 25 to $50,000, you never hear Nicole make another statement that she put his-her hand back over Don Rogers'[s] mouth?
>
> A. No.

> Q. You didn't hear a statement that [defendant] held him down so that the pillow could be placed over his head?
>
> A. I did hear a statement like that.
>
> Q. You did hear that statement?
>
> A. Yes.
>
> Q. What statement did you hear?
>
> A. Billie asked her to help pin him down, so that she could put the pillow on his head.

As a result of this damaging testimony, defendant argues, counsel abandoned a "mere presence" defense, which had earlier been argued in opening statements. Defendant argues that counsel should have impeached Chahine with three prior statements denying that defendant was involved in the smothering of Donald. Those prior statements consisted of the following:

> (1) A videotaped interview of Chahine by a police detective, in which Chahine stated that defendant did not say what he was doing at the time Donald was smothered;
>
> (2) Chahine's testimony at Billie Rogers'[s] trial, in which he testified that defendant "did not tell me . . . if she did help her with the pillow or not;" and
>
> (3) Chahine's testimony at the preliminary examination in this

> matter, in which he testified that defendant told him that he stood back and did not help smother the victim.

Defendant's argument is based on several assumptions. First, he assumes that there was a discrepancy between the trial testimony and the prior versions of the events. At trial, defense counsel finished his cross-examination of Chahine with a clarification that changed the character of the allegation:

> Q. And at no time during the conversation [with police] did you tell Detective Tullock that while the pillow [w]as over, Nicole also indicated to you she was holding him down?
>
> A. No. She was holding her [sic] down during some period of time. I don't remember if while the pillow was in his face. All I remember is that Billie asked Nicole to help her pin him down.
>
> Q. So it could have been during the time that they were pouring alcohol down his throat?
>
> A. It could have been.

Because counsel succeeded in getting Chahine to concede that his impression may have been inaccurate, we cannot say that defendant was prejudiced by counsel's failure to impeach him further.

Second, defendant assumes that defense counsel was aware of the materials containing

the witness' prior statements. Defendant asserts that certain statements are contained in a transcript of Chahine's videotaped interview with the police, yet he concedes that trial counsel did not have the transcript. Instead, counsel had a copy of the videotape, which may or may not have been intelligible. Defendant also has not shown that trial counsel had a copy of Chahine's testimony from Billie Rogers'[s] trial. Indeed, it was defendant's financial inability to pay for that transcript that led his second attorney to withdraw from the case.

Third, defendant assumes that the "mere presence" theory was abandoned as a result. In fact, during opening statement defense counsel raised several potential defenses, including abandonment, mere presence, and inconsistencies between medical reports and prosecution witnesses' versions of the events. During closing argument, counsel argued that defendant abandoned the endeavor, and was shocked to return and find that Billie Rogers had suffocated her husband. There is nothing in the record to indicate that counsel failed to argue a "mere presence" defense in closing because of the way Chahine testified. We may not presume that counsel was ineffective. Indeed, it is possible that counsel declined to argue a "mere presence" defense because it would have diminished the credibility of defendant's version, in which defendant claimed that he was not present when his aunt suffocated the victim.

B. Evidence Attacking Defendant's Character

Defense counsel elicited testimony from defendant that he had worked as an escort, but was not involved in prostitution. This opened the door for the prosecutor to ask about a pending prostitution charge against defendant. On appeal, defendant argues that counsel was ineffective for bringing out such "lifestyle" evidence rather than focusing on guilt or innocence. We disagree. Defendant had testified that he made a lot of money by running an escort service and had a boyfriend who would have paid for the $10,000 sex[-]change operation. Although motive is not strictly an element of an offense, it is always relevant. The concession of sordid details about defendant's lifestyle could have negated any financial motive, and also could have created an atmosphere of candor– especially since, as defendant argues on appeal, he made no effort to hide his sexuality from the jury. Defendant has failed to overcome the strong presumption that counsel engaged in sound trial strategy. As for the evidence that defendant was currently charged with prostitution, defendant has not shown that counsel was aware of that charge.

C. Failure to Impeach Witness

During trial, Chahine testified that defendant did not drink much. Defendant argues that this contradicted a planned intoxication defense. Defendant argues that Chahine should have been impeached with

prior statements made to the police about defendant's excessive drinking. Again, however, the record does not demonstrate, nor has defendant shown, that counsel was aware of the prior statements. Additionally, even if counsel was aware of the statements, defendant has not shown why counsel decided not to impeach the witness with those statements.

D. Jury Instructions and Deliberations

Defendant argues that trial counsel was ineffective for failing to request a jury instruction on the defense of abandonment, and for failing to object to the court's response to a jury note during deliberations.

Defendant has failed to identify the specific instruction he claims counsel should have requested, thereby precluding a determination whether the desired instruction would have accurately stated the law. To the extent defendant suggests that counsel should have requested CJI2d 9.4, we find no error. That instruction would have implied that defendant intended to commit the offense at one time, but "freely and completely gave up the idea of committing the crime." The instruction would have contradicted defendant's assertion that he thought Billie Rogers was joking, and was surprised to find her suffocating her husband.

Regarding the trial court's response to the jury's note, because we conclude in part VI, *infra*, that the court did not err in its response

> to the jury, we conclude that counsel did not err by failing to object.
>
> E. Failure to Object to Prosecutor's Conduct
>
> Defendant also argues that trial counsel was ineffective for failing to object to the prosecutor's arguments and tactics discussed in part IV, *infra*. Because we find no error in the prosecutor's arguments, defendant has not shown that counsel was ineffective for failing to object.

Titlow, 2003 WL 22928815, at *3-5 (citations and footnotes omitted).

The Michigan Court of Appeals correctly analyzed Petitioner's claim of ineffective assistance of counsel using the two-pronged test enunciated federally in *Strickland*. As the Supreme Court noted:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the

> evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 689.

Obviously, this does not mean that a trial counsel's tactical decisions are completely immune from Sixth Amendment review. However, they must be particularly egregious before they will provide a basis for relief. *Martin v. Rose*, 744 F.2d 1245, 1249 (6th Cir. 1984). It appears to the Court that Petitioner is nitpicking at the actions of trial counsel. For example, on page twenty-nine of the brief, she states "[w]hile Petitioner admits that her counsel did impeach the witness during cross examination, the impeachment was on completely irrelevant points." On page thirty-three of the brief, Petitioner argues that there were more effective ways of demonstrating that she had no monetary motive for committing the crime other than having her admit that she was an escort. Those are disagreements with trial strategy and are not reasons for granting habeas relief.

Petitioner's claims regarding her trial counsel "largely miss the point: just as (or more) important as what the lawyer missed is what he did not miss. That is, we focus on the adequacy or inadequacy of counsel's (hindsight) potential for improvement. Furthermore, our review is highly deferential." *Coe v. Bell*, 161 F.3d 320, 342 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999) (internal citation omitted).

Moreover, several claims are not entitled to review. Petitioner's claim that trial counsel was ineffective for failing to request a jury instruction on defense of abandonment was essentially procedurally defaulted by the Court of Appeals when it found that "Defendant has failed to identify the specific instruction he claims counsel should have requested, thereby precluding a determination whether the desired instruction would have accurately stated the law." *Titlow*, 2003 WL 22928815, at *5. The fact that the Court of Appeals did analyze Petitioner's contention that counsel should have requested the desired instruction, in the alternative, does not waive the default, *see Pearl v. Cason*, 219 F.Supp.2d 820, 828 (E.D. Mich. 2003) (citing *Paprocki v. Foltz*, 869 F.2d 281, 285 (6th Cir. 1989), and *McBee v. Abramajtys*, 929 F.2d 264, 267 (6th Cir. 1991)).

Petitioner apparently does not realize that she has procedurally defaulted this claim. Therefore, she does not attempt to show cause for the default. Because she has failed to establish cause to excuse the default, there is no need to address the prejudice prong. *See Smith v. Murray*, 477 U.S. 527, 533 (1986), *Long v. McKeen*, 722 F.2d 286, 289 (6th Cir. 1983), *cert. denied*, 465 U.S. 1106 (1984).

Furthermore, Petitioner's claims of ineffective assistance of counsel relating to the trial court's response to the jury's question during deliberations and to the purported failure to object to prosecutorial misconduct are simply without merit because the underlying claims (concerning the jury question and the conduct of the prosecutor) are without merit. As noted by the Sixth Circuit Court of Appeals in *Durr v.*

Mitchell, 487 F.3d 423, 439 (6th Cir. 2007), "[i]n a trial of any size, numerous potentially objectionable events occur" and, quoting *Engle v. Isaac*, 456 U.S. 107. 134 (1982), added that, "the Constitution does not insure that defense counsel will recognize and raise every conceivable constitutional claim." The Sixth Circuit further noted that, it is only where, "defense counsel . . . consistently fail[s] to use objections, despite numerous and clear reasons for doing so, that counsel's failure cannot reasonably be said to have been part of a trial strategy or tactical choice." *Durr*, 487 F.3d at 439 (quoting *Lundgren v. Mitchell*, 440 F.3d 754, 774-775 (6th Cir. 2006)).

Petitioner simply disagrees with how the Court of Appeals resolved her claims of ineffective assistance of trial counsel on direct appeal. However, the Court concludes that the Court of Appeals used the correct standard for judging a claim of ineffective assistance of counsel. Therefore, Petitioner cannot claim that the Court of Appeals's ruling is contrary to, or an unreasonable application of, clearly established Supreme Court precedent. The Court finds that Petitioner is not entitled to habeas relief regarding her remaining ineffective-assistance-of counsel claims.

C. Prosecutorial Misconduct Claims

In her next habeas claim, Petitioner argues that she was denied her rights to due process and a fair trial by multiple instances of prosecutorial misconduct.

"When a petitioner makes a claim of prosecutorial misconduct, 'the touchstone of due process analysis . . . is the fairness of the trial, not the culpability of the prosecutor." *Serra v. Michigan Dep't. of Corrs.*, 4 F.3d

1348, 1355-1356 (6th Cir. 1993), *cert. denied*, 510 U.S. 1201 (1994) (quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982)). On habeas review, the role of the federal court is to determine whether the conduct was "so egregious as to render the entire trial fundamentally unfair." *Serra*, 4 F.3d at 1355 (*Cook v. Bordenkircher*, 602 F.2d 117, 119 (6th Cir. 1999), *cert. denied*, 444 U.S. 936 (1979)). "[T]he misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial or so gross as probably to prejudice the defendant." *Mason v. Mitchell*, 320 F.3d 604, 635 (6th Cir. 2003) (quoting *Simpson v. Jones*, 238 F.3d 399, 409 (6th Cir. 2000) (internal quotation marks and citation omitted)). The Sixth Circuit in *Serra* set out the following test to determine if fundamental fairness results from prosecutorial misconduct:

> In every case, we consider the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they are isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the strength of the competent proof to establish the guilt of the accused.

Serra, F.3d at 1355-1356.

It is important to note that "[c]laims of prosecutorial misconduct are reviewed deferentially on habeas review." *Millender v. Adams*, 376 F.3d 520, 528 (6th Cir. 2004), *cert. denied*, 544 U.S. 921 (2005).

In its opinion, the Michigan Court of Appeals rejected Petitioner's claim of prosecutorial misconduct as follows:

A. Vouching for Credibility and Allowing Perjury

Defendant argues that the prosecutor vouched for the credibility of its primary witness and failed to disclose that perjury was being committed. In addressing comparisons between Chahine's statements to the police during the investigation, and Chahine's testimony given at trial, the prosecutor asked the officer-in-charge whether the versions were consistent:

> Q. Now, the information that – you heard what Mr. Chahine's testimony was over the last two days in Court, did you not?
>
> A. Yes.
>
> Q. Is that the information that he related to you at the police station in Troy on August the 30th?
>
> A. Generally, yes.

Defendant argues that this questioning violated his right to due process for three reasons: (1) the prosecutor failed to disclose that Chahine was lying when he implicated defendant; (2) the prosecutor failed to disclose that the officer was lying when he said that Chahine's testimony was consistent with prior statements; and (3) the prosecutor vouched for Chahine's credibility via the officer's testimony. We disagree. Defendant has not shown that any witness committed perjury. Defendant reads too much into the officer's

brief response, in which the officer qualified his answer using the word "generally." The officer's testimony may be equally interpreted as conveying that Chahine was presenting a somewhat different story in court because his testimony was only "generally" the same as information given at the police station. While a prosecutor may not ask a witness to comment on the credibility of other witnesses, he may attempt to ascertain which facts are in dispute.

Defendant also argues that the prosecutor vouched for the credibility of his witnesses when he stated several times in closing argument that "we know" certain facts, and "that's what happened" and "that was the truth." Again, defendant reads these statements too broadly. Viewed in context, they constituted proper comment on the evidence, and did not suggest that the government had some special knowledge about the facts.

B. Shifting the Burden of Proof and Denigrating Defense Counsel

During closing argument, the prosecutor addressed the differing points of view about which evidentiary matters were the most significant:

> The medical testimony in this case is not the crux of this case. This is the crux of tis [sic] case, and Mr. Cataldo [defense counsel] did not address this. Mr. Cataldo ran from

> this. There's an old saying in the law is [sic] that when you have the facts on your side, you pound on the facts. And when you have the law on your side, you pound on the law. And when you have neither the law nor the facts on your side, you pound on the table. That's what's going on here. This was not addressed. Mr. Cataldo says that we have to look at the medical testimony and I say look at the tape [in which defendant expressed remorse for killing Rogers].

Defendant argues that these remarks improperly implied that defense counsel had a duty to address certain facts, and denigrated defense counsel by implying that he was trying to mislead the jury. Viewed in context, however, we believe the remarks reflect a proper attempt to distinguish the different points of view urged by both sides in this case.

C. Right to Remain Silent

Next, defendant argues that the prosecutor improperly commented upon his right to remain silent when he asked the arresting officer about statements defendant made upon his arrest in Chicago. The officer testified that he and his partner went to defendant's apartment and informed him that they had a warrant for the murder of Donald Rogers.

> A. At this time, M[s]. Titlow, spontaneously stated, where's my

aunt? Is my aunt under arrest too? At that time, we stopped her and advised her – advised [her] of his rights and there was no further talking to her.

Q. Okay. And you had not asked any questions prior to Titlow making that statement, had you?

A. No, sir.

Q. You said a spontaneous utterance?

A. Yes, sir.

Q. Alright. And then after [s]he said that, you advised [her] of [her] rights?

A. Yes, I did[.]

Q. But what [s]he said was, where's my aunt? Has she been arrested too?

A. Yes, sir.

Q. Any other comment about why you were arresting [her] or anything like that?

A. No, sir.

Q. Just where's my aunt?

A. Is she under arrest too.

Evidence that a defendant made a statement and said nothing further does not denigrate the defendant's exercise of the right to remain silent. This isolated reference was not used to impeach defendant or to support the prosecutor's theory that defendant committed the offense and, therefore, does not support a claim of misconduct.

D. "Improper" Questioning of Defendant

Defendant argues that the prosecutor erred by asking about prior arrests not leading to convictions, defendant's sex life and preferences, and financial matters. The defense opened the door to these matters. The prosecutor did not err by asking follow-up questions testing the veracity of defendant's testimony.

E. Arguing Facts Not in Evidence

Finally, defendant argues that the prosecutor argued facts not in evidence when he misquoted Chahine in closing argument by stating that defendant told Chahine, "I don't know why I did it. I don't know why I held Don down while Billie smothered him. These are her words . . . two weeks after the murder." Defendant argues that he never made such a statement to Chahine. We find no error in the prosecutor's attempt to translate Chahine's testimony about defendant's statements into a first-person account by defendant. The gist of the allegations are the same: that defendant told Chahine that he did not know why he participated, and that he held the victim down. Although Chahine later distanced himself from the certainty of this testimony, the prosecutor was free to argue the inference that defendant held Donald Rogers down during the suffocation and not merely while Billie poured liquor down his throat.

Titlow, 2003 WL 22928815, at * 6-7 (citations and footnotes omitted)..

It appears that the Court of Appeals may have procedurally defaulted Petitioner's claims of prosecutorial misconduct. In discussing Petitioner's claims of ineffective assistance of counsel, it noted that Petitioner "also argues that trial counsel was ineffective for failing to object to the prosecutor's arguments and tactics discussed in part IV, *infra*." *Titlow*, 2003 WL 22928815, at * 5. The Court of Appeals states "[b]ecause we find no error in the prosecutor's arguments, defendant has not shown that counsel was ineffective for failing to object." *Id.* That appears to be an assertion that the claims were reviewed for plain error and, therefore, were procedurally defaulted.

While the Court of Appeals appears to discuss the merits of the claims of prosecutorial misconduct, it is only does so only in the context of a plain-error review. That does not change the fact that the claims were procedurally defaulted. Plain-error review, although involving some discussion of the "merits" of the claims presented by Petitioner, is in fact not a review on the merits. It is the opposite of review on the merits. Rather, it is a reflection of the Court of Appeals "actually enforcing" the state procedural default. In other words, as the Sixth Circuit has found, "plain error" review does not constitute a waiver of state procedural rules. *Lundgren*, 440 F.3d at 765 ("Plain[-]error analysis is more properly viewed as a court's right to overlook procedural defects to prevent manifest injustice, but is not equivalent to a review of the merits" (emphasis added)); *White v. Mitchell*, 431 F.3d

517, 525 (6th Cir. 2005), *cert. denied*, 549 U.S. 1034 (2006); *Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001).

In any case, the claims do not merit habeas relief. For example, while Petitioner argues that the prosecutor improperly vouched for Chahine, because the fairness of the trial, not the culpability of the prosecutor is the touchstone of a due process analysis, federal habeas relief is not appropriate for purported improper vouching by a prosecutor. *Byrd v. Collins*, 209 F.3d 486, 537 (6th Cir. 2000), *cert. denied*, 531 U.S. 1082 (2001). As was noted in *Byrd*, while such relief might rarely be appropriate in the context of a direct appeal where a federal court would exercise supervisory control over a federal trial court proceeding, *id*, such is obviously not the situation in federal-habeas proceedings arising out of a state-court conviction, where the issue is being raised collaterally and where deference to the state-court rulings must be given.

Petitioner also claims that the prosecutor engaged in misconduct when he failed to disclose that Chahine and a police officer were lying on the stand (this claim is phrased in terms of failure to disclose exculpatory evidence and failure to advise counsel and the court of false testimony). The Court of Appeals found that Petitioner "has not shown that any witness committed perjury" and that many of Petitioner's claims were based on her reading statements of witnesses and the prosecutor himself "too broadly." *Titlow*, 2003 WL 22928815, at * 6.

Because Petitioner failed to rebut the presumption of correctness accompanying these factual findings by

the Court of Appeals, this Court finds that the Court of Appeals's rejection of these claims was not unreasonable or contrary to clearly established Supreme Court precedent.

Other claims of prosecutorial misconduct by Petitioner were rejected by the Court of Appeals on very fact-specific grounds such as its own review of the comments or the questions in context (i.e. a determination by the Court of Appeals that a comment was "isolated", that "the defense opened the door" to the subjects at issue, that the prosecutor did not refer to Petitioner's right to silence because "[e]vidence that a defendant made a statement and said nothing further does not denigrate the defendant's exercise of the right to remain silence"). Those factual assertions in particular are entitled to great deference. In addition, the Court of Appeals referenced the trial court's instruction to the jury that the arguments of counsel are not evidence (especially to Petitioner's claim that he misquoted him during closing argument). Such limiting instructions have been held to prevent due process violations from occurring due to purported prosecutorial misconduct, especially when it occurs during closing argument. *Gillard v. Mitchell*, 445 F.3d 883, 898 (6th Cir. 2006), *cert. denied*, 549 U.S. 1264 (2007).

Against that backdrop, the Court concludes that Petitioner is not entitled to habeas relief regarding these prosecutorial-misconduct claims.

D. Prosecutorial Vindictiveness Claim

In her next habeas claim, Petitioner argues that she was denied due process because the charge of first-

degree murder was a result of prosecutorial vindictiveness.

The Michigan Court of Appeals, in addressing, and rejecting, this claim, stated:

> Defendant argues that his due process rights were violated when the prosecutor continued to prosecute him, despite "knowing" that he did not commit the charged offense, knew that he had "passed" a polygraph examination, and had expressed satisfaction with the plea agreement that would have resulted in a manslaughter conviction.
>
> The authority to prosecute for violation of state law is vested solely and exclusively with the prosecuting attorney. A trial court's authority over the discharge of the prosecutor's duties is limited to those activities or decisions by the prosecutor that are unconstitutional, illegal, or ultra vires. A decision to dismiss a case or proceed to trial ultimately rests in the sole discretion of the prosecutor. Absent some reason to conclude that the prosecutor's acts are unconstitutional, illegal, or ultra vires, the prosecutor's decision whether to proceed with a case is exempt from judicial review. If, however, a prosecutor continues to pursue charges knowing that a defendant is not guilty, the prosecutor would be committing an unconstitutional, illegal, or ultra vires act.
>
> Here, defendant has not shown that the prosecutor "knew" that he did not commit the offense. We may not infer that the prosecutor

> "knew" that defendant did not commit the offense from the polygraph results or from the prosecutor's willingness to negotiate a guilty plea to a lesser offense. The shortcomings of polygraph examinations are well known. Defendant deluded himself into believing that he was a woman, and the results of the polygraph examination could also have been delusional and, therefore, unreliable.

Titlow, 2003 WL 22928815, at 8.

Petitioner has not shown that the Court of Appeals's finding that the prosecutor was not vindictive in this matter is unreasonable. As noted by the Court of Appeals, the mere fact that a prosecutor engages in plea negotiations with a criminal defendant and allows him to plead to a lesser charge does not mean that he believes him to be innocent of the higher charge, such that subsequent reinstatement of the higher charge, when the defendant chooses to withdraw from the plea agreement, would be vindictive per se. Further, on the unique facts of this case, Petitioner "passing" a polygraph examination, as found by the Court of Appeals, is indicative only of Petitioner's unusual state of mind and nothing more.

Petitioner is denied habeas relief on this claim.

E. Jury Question Claim

In her next habeas claim, Petitioner argues that she was denied due process and her right to a properly instructed jury when the trial court failed to respond to a deliberating jury's question of law. The Michigan Court of Appeals rejected this claim, stating:

Defendant argues that the trial court erred by failing to respond when the jury asked a question during deliberations. The jury's note inquired about the "malice" element of second degree murder:

> Does someone's inaction, non-action to stop or prevent a crime resulting in death amount to fulfillment of condition three, second degree murder, knowingly creating a high risk of death, knowing that death would likely be the result of his actions?

The trial court responded, "This is a question that is up to you to decide an answer." Neither party objected on the record.

We find no error in the trial court's response, and therefore no prejudice from defense counsel's failure to object. First, we disagree with defendant's claim that the trial court failed to respond to the jury's question. The court responded by instructing the jury that "[t]his is a question that is up to you to decide an answer." Second, we conclude that the trial court's response was not erroneous. Defendant essentially seeks a ruling that, as a matter of law, inaction can never satisfy the malice requirement of second-degree murder. Defendant cites no authority in support of this proposition. In any event, the trial court separately instructed the jury on the elements of aiding and abetting, explaining that, in order to convict defendant of aiding and

abetting murder, it was required to find that he "did something to assist in the commission of the crime," and that he "must have intended the commission of the crime alleged or must have known the other person intended its commission at the time of giving the assistance." Additionally, the court instructed the jury:

> It doesn't matter how much help, advice or encouragement the Defendant gave. However, you must decide whether he intended to help another commit the crime and whether his advice, help or encouragement actually did help, advise or encourage the crime. Even if the Defendant knew that the alleged crime was planned or being committed, the mere fact that he was present when it was committed was not enough to prove that he assisted in committing it.

Thus, the jury was properly instructed that it could not convict defendant unless it found that he actually intended and assisted in the commission of the crime.

The jury's note was not directed at the court's aiding and abetting instruction, but at the intent element of second-degree murder. In this regard, the court did not err by instructing that this fact-intensive consideration was a matter for the jury to decide. The court's response did nothing to undercut the court's earlier instructions whereby the jury was told

> that it could not convict defendant of aiding and abetting an commission of the crime. Viewed as a whole, the court's instructions were not improper.

Titlow, 2003 WL 22928815, at * 8-9.

Again, it appears that the Court of Appeals procedurally defaulted Petitioner's jury question claim. *See* Discussion IV-C. The Court of Appeals noted that neither party objected on the record to the trial court's response to the question and stated that, "[a]s a court of review, we must have a record to review." *Titlow*, 2003 WL 22928815, at * 8, n. 10. The manner in which the Court of Appeals proceeds to address the claim, again, indicates a plain-error type of review in the absence of an objection and a record of an objection.

Because Petitioner asserts that her claim was preserved for state court appellate review by a purported "off the record" objection (an assertion rejected by the Michigan Court of Appeals), she does not believe that she has procedurally defaulted this claim, and therefore does not attempt to show cause for the default. As Petitioner has failed to establish cause to excuse the default, there is no need to address the prejudice prong. *Smith*, 477 U.S. at 533, *Long*, 722 F.2d at 289.

In the alternative, Petitioner has not shown that the Michigan Court of Appeals's ruling on her jury question claim is contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court or an unreasonable determination of the facts. To the extent that the analysis undertaken by the Court of Appeals involves

an interpretation or a discussion of the elements of the state law offense of second-degree murder and the state law concept of aiding and abetting, those are state-law matters and are not cognizable in federal habeas review. *See Walker v. Engle*, 703 F.2d 959, 962 (6th Cir. 1983), *cert. denied*, 464 U.S. 951 (1983). Petitioner is therefore not entitled to habeas review on these claims.

F. Remaining Claims

Petitioner's remaining claims VI-X (I-V of her "amendment" to her brief) were presented in her motion for relief from judgment in the state courts under Mich.Ct.R. 6.500 and were procedurally defaulted by the state courts. The Michigan Supreme Court (as well as the Michigan Court of Appeals) denied Petitioner relief with respect to those claims by stating that the appeal was denied "for failure of the defendant to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. Titlow*, No. 273274 (Mich.Ct.App. Apr. 27, 2007); *People v. Titlow*, 480 Mich. 890, 738 N.W.2d 715 (2007). And, Petitioner has failed to establish good cause and prejudice so as to excuse the default and has failed to demonstrate that a fundamental miscarriage of justice would result if this Court refused to excuse the default.

It is well established in this circuit that the procedural bar set forth in Mich.Ct.R. 6.508(D) constitutes an adequate and independent ground on which the Michigan Supreme Court may rely in foreclosing review of federal claims. *Howard v. Bouchard*, 405 F.3d. 459, 477 (6th Cir. 2005), *cert. denied*, 546 U.S. 1100 (2006). In *Burroughs v.*

Makowski, 282 F.3d 410, 413-414 (6th Cir. 2002), the Sixth Circuit considered the language used by the Michigan Supreme Court in this case and found that it presented a sufficient explanation that the ruling was based on the failure to comply with a state procedural rule. *See also, McFarland v. Yukins*, 356 F.3d 688, 697-698 (6th Cir. 2004); *Simpson v. Jones*, 238 F.3d 399, 407-408 (6th Cir. 2000). Where a state court denies relief on independent and adequate state procedural grounds, as the state courts did here, a prisoner may only obtain habeas review of such claims if he can establish "cause and prejudice" or that the failure to review the claims would result in a fundamental miscarriage of justice." *Strickler v. Greene*, 527 U.S. 263 (1999). In order to establish "cause" to excuse his default, a habeas petitioner must establish that some objective factor external to his defense prevented him from complying with the state-procedural rule. *Murray v. Carrier*, 477 U.S. 478 (1986).

Here, Petitioner argues that the ineffectiveness of both his trial and appellate counsel suffice as good cause for the failure to raise the claims he presented to the state courts in his motion for relief from judgment. However, because the claims of ineffective assistance of trial counsel that were raised for the first time in that motion as well as the claim of ineffective assistance of appellate counsel were themselves procedurally defaulted by the state courts, Petitioner cannot use those claims as cause to excuse the default of her remaining claims. *Burroughs*, 411 F.3d at 668.

In any case, Petitioner has not shown that her trial and appellate attorneys were ineffective for not raising

the claims she now states should have been raised at trial and in her direct appeal.

As for Petitioner's trial attorney, Petitioner claims in the context of her motion for relief from judgment that trial counsel should have objected to the state law sentencing guidelines because, under the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), and Supreme Court authority which preceded it. She also claims that trial counsel should have objected "to the jury being given the option of finding murder premised on [her] failure to stop or prevent a crime resulting in death." The failure to raise those objections cannot suffice as good cause to excuse procedural default because the underlying claims are without merit. As for the sentencing claim, Petitioner has not cited any Supreme Court authority, or to a court within this circuit, that indicates the *Blakely* line of cases applies to Michigan's intermediate sentencing scheme. Thus, she simply cannot show (retroactively) that her trial counsel was ineffective for not objecting.

The jury question or instruction claim involves a matter of state law and an interpretation of the elements of a state-law offense (second-degree murder). Resolution of claims or disputes concerning the elements of state-law offenses is purely a matter of state law not cognizable in federal-habeas review. *Walker*, 703 F.2d at 962. In other words, state courts are the final arbiters of matters of state law and federal courts will not interfere in such matters. *See Oviedo v. Jago*, 809 F.2d 326, 328 (6th Cir. 1987).

Further, on habeas review, purported errors in jury instructions "are not reviewable unless they deprive a defendant of constitutional due process." *Gall v.*

Parker, 231 F.3d 265, 321 (6th Cir. 2000), *cert. denied*, 533 U.S. 941 (2000). In deciding this question, a federal court reviews whether the instructional error "so infected the entire trial that the resulting conviction violates due process" and considers that "an omission or incomplete instruction is less likely to be prejudicial than a misstatement of the law." *Alder v. Burt*, 240 F.Supp.2d 651, 665 (E.D. Mich. 2003) (citing *Henderson v. Kibbe*, 431 U.S. 145, 154-155 (1977) and *Scott v. Mitchell*, 209 F.3d 854, 882 (6th Cir. 2000), *cert. denied*, 531 U.S. 1021 (2000)).

The trial court's response to the jury's question during deliberation, when considered in context, sufficiently placed the elements of the offense before the jury so as to protect Petitioner's right to due process. The reasons for that are clearly outlined by the Michigan Court of Appeals in its opinion following Petitioner's direct appeal. When read as a whole, as they must, the instructions did not deprive Petitioner of his right to due process. Petitioner's trial counsel had no grounds to object.

Furthermore, the evidence against Petitioner was so overwhelming that any constitutional error in the trial court's response to the jury's question or in the instructions in general was harmless. *Fry v. Pliler*, 551 U.S. 112 (2007) (holding that, on collateral review, a federal habeas court assesses the prejudicial impact of a state court's constitutional error under the "substantial and injurious effect" standard, not under the more strict "harmless beyond a reasonable doubt" standard, regardless of whether the state court recognized the error and reviewed it under the harmless-beyond-a-reasonable-doubt standard).

Petitioner also asserts that the evidence was insufficient to convict her of second-degree murder. Again, the evidence presented at trial in this matter indicates that Petitioner was guilty of at least second-degree murder both as a principal and on an aiding and abetting theory under Michigan state law.

The Court concludes that Petitioner was not deprived of her right to the effective assistance of trial counsel. She cannot therefore use ineffective assistance of trial counsel as good cause to excuse procedural default.

Regarding appellate counsel, Petitioner's appellate counsel, raised five claims in her direct appeal in the Michigan Court of Appeals. She also filed a motion to remand which was denied. The Court of Appeals issued a detailed opinion ruling against Petitioner on those claims. While Petitioner's appellate counsel did not raise every conceivable claim during the direct appeal, the United States Supreme Court has held that failure to raise every colorable argument does not constitute ineffective assistance of counsel. "A brief that raises every colorable issue runs the risk of burying good arguments—those that, in the words of the great advocate John W. Davis, 'go for the jugular'—in a verbal mound made up of strong and weak contentions." *Jones v. Barnes*, 463 U.S. 745, 753 (1983).

Appellate counsel's actions, of excluding the claims subsequently raised by Petitioner in her motion for relief from judgment in favor of the claims she did, were clearly a strategic decision and does not constitute ineffective assistance of counsel.

Petitioner cannot establish that her appellate attorney was so thoroughly ineffective that defeat was "snatched from the jaws of victory." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) (en banc), *cert. denied*, 508 U.S. 975 (1993); *West v. Seabold*, 73 F.3d 81, 94 (6th Cir. 1996), *cert. denied*, 518 U.S. 1027 (1996). Petitioner has failed to show that his appellate attorney's purported inadequacy deprived him of victory.

In short, Petitioner has failed to establish cause to excuse her default of these claims by either showing that her trial or appellate attorneys were ineffective. As Petitioner has failed to establish cause to excuse her default, there is no need to address the prejudice prong. *Smith*, 477 U.S. at 533; *Long*, 722 F.2d at 289. Further, Petitioner has not shown that a fundamental miscarriage of justice would result if this Court declined to excuse the default. Because Petitioner procedurally defaulted her claims VI through X, by not presenting them in the her direct appeal, by not showing cause and prejudice for her failure to raise them sooner, and by not showing that a fundamental miscarriage of justice would occur from this Court's refusal to consider the claims, review of her those claims is barred.

G. Certificate of Appealability

"[A] prisoner seeking post conviction relief under 28 U.S.C. § 2254 has no automatic right to appeal a district court's denial or dismissal of the petition. Instead, [the] petitioner must first seek and obtain a [certificate of appealability.]" *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A certificate of appealability may issue "only if the applicant has made a substantial

showing of the denial of a constitutional right." 28 U .S.C. § 2253(c)(2).

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong . . . . When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Reasonable jurists could debate the Court's resolution of Petitioner's constitutional claims or conclude that the issues deserve encouragement to proceed further. The Court therefore **ISSUES** a certificate of appealability on Petitioner's claims. Petitioner may proceed *in forma pauperis* on appeal because an appeal could be taken in good faith. 28 U.S.C. § 1915(a) (3).

V. CONCLUSION

The state courts' decisions in this case were not contrary to federal law, an unreasonable application of federal law, or an unreasonable determination of the facts. Petitioner has failed to establish that she is presently in custody in violation of the Constitution or laws of the United States.

Accordingly, **IT IS ORDERED** that Petitioner's petition for a writ of habeas corpus [dkt. # 1] is **DENIED**.

IT IS FURTHER ORDERED that the Court **ISSUES** Petitioner Titlow a certificate of appealability and **GRANTS** her an application for leave to proceed on appeal *in forma pauperis*.

s/Marianne O. Battani
MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE

Dated: October 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that on the above date a copy of this Opinion and Order was served upon the Petitioner and Counsel for the Respondent via ordinary U.S. Mail and electronically.

s/Bernadette M. Thebolt
Case Manager

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 11, 2003

v

No. 241285
Oakland Circuit Court
LC No. 2001-177745-FC

VONLEE NICOLE TITLOW,
Defendant-Appellant.

Before: Cavanagh, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316, but was convicted of the lesser offense of second-degree murder, MCL 750.317, following a jury trial. He appeals as of right.[1] We affirm.

I. Facts

Defendant's conviction arises from his involvement in the killing of his elderly, wealthy uncle, Donald Rogers. According to the prosecution's theory of the case, defendant agreed to help his aunt, Billie Rogers,

---

[1] Defendant took on the appearance of a woman, and preferred to be called "Nicole." Nonetheless, he denied that he wanted a sex change operation. At trial, witnesses used a combination of male and female pronouns when referring to defendant. Accordingly, some quotations from the trial record refer to defendant as a female. This opinion will generally refer to defendant using male pronouns.

kill Donald so that Billie could quickly inherit Donald's large estate. Defendant allegedly planned to pay for a sex change operation with his share of the proceeds.

Danny Chahine befriended defendant in June 2000, after meeting him in a casino. Defendant was then living with Donald and Billie Rogers. On August 12, 2000, defendant called Chahine on the telephone and tearfully told him that Donald had been found dead on the kitchen floor. Chahine was suspicious because defendant had previously talked about Billie's willingness to pay $25,000 to have her husband killed because he objected to Billie incurring credit card debt in order to gamble at casinos. When Chahine asked defendant if he or his aunt had done something to Donald, defendant did not reveal anything incriminating, but said he would explain everything later.

Chahine testified that defendant later confided that he had helped kill Donald Rogers. According to Chahine, he had two inculpatory conversations with defendant: (1) a dinner meeting on August 14 or 15 in which defendant first disclosed the killing; and (2) a second meeting that was secretly recorded. The recording and a transcript of the second meeting were introduced into evidence.

Several of defendant's issues involve allegations against his attorneys. Defendant was represented by a succession of three attorneys. The first attorney negotiated and recommended a plea agreement in which defendant pleaded guilty to manslaughter with a seven to fifteen year sentence. Under the agreement, defendant was required to testify against Billie Rogers and successfully pass a polygraph test denying his

involvement in the offense. According to the opinion of the polygraph examiner, defendant was being truthful when he denied being involved in the killing.

Although the record is not fully developed on this point, defendant told a sheriff 's deputy at the jail that he planned to plead guilty despite his protestations of innocence. The deputy suggested that it would not be proper to plead guilty to an offense that defendant did not commit, and perhaps defendant should talk with another attorney. The deputy put defendant in touch with an attorney, who in turn recommended that defendant speak with another attorney. That attorney appeared in this matter and, according to defendant, recommended that he withdraw his guilty plea. Defendant moved to withdraw his plea because the agreed upon sentence exceeded the sentencing guidelines range.

The second attorney later moved to withdraw because defendant did not have sufficient resources to pay for a transcript of Billie Rogers' trial.[2] In questioning defendant and counsel, the court learned that counsel's firm had agreed to represent defendant for some jewelry and assignment of a "book deal." The court granted counsel's motion to withdraw from representation, and appointed a third attorney to represent defendant at trial.

II. Effective Assistance of Interim Counsel

In his first issue, defendant argues that he was denied the effective assistance of counsel when his second attorney recommended that he withdraw his

---

[2] Billie Rogers was acquitted and eventually died.

guilty plea to manslaughter, which resulted in a trial verdict on the higher offense of second-degree murder. Defendant also argues that the attorney had a conflict of interest when rendering this advice because his law firm had obtained the media rights to defendant's story.

The right to the effective assistance of counsel is not offended unless counsel's performance fell below an objective standard of reasonableness and defendant was so prejudiced that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Prejudice exists when there is a reasonable probability that the result of the proceeding would have been different absent counsel's error. *Pickens*, *supra* at 312; *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

A. Withdrawal of Guilty Plea

When a defendant pleads guilty, he must be prepared to admit the elements of the offense. MCR 6.302(D)(1). The record discloses that the second attorney's advice was set in motion by defendant's statement to a sheriff 's deputy that he did not commit the offense.[3] Defendant offers the affidavit of his first

---

[3] Defendant did not move in the trial court for an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Although defendant filed a motion to remand for a

attorney, who negotiated a plea agreement that he thought was in defendant's best interests. When a defendant proclaims his innocence, however, it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty – no matter how "good" the deal may appear. We therefore reject defendant's argument that his second attorney gave him "grossly erroneous advice."[4] On the proofs and arguments offered by defendant, defendant has failed to demonstrate that his second attorney's advice to withdraw his plea fell below an objective standard of reasonableness.[5]

Ginther hearing in this Court, the motion was denied. Therefore, our review of this issue is limited to mistakes apparent from the record. *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987). On appeal, defendant has submitted additional materials that are not part of the lower court record. We will consider these materials for the limited purpose of determining whether they disclose factual support for defendant's ineffective assistance of counsel claim, such that remand for a *Ginther* hearing would be appropriate.

[4] This is not to suggest that defendant's first attorney who negotiated the plea agreement performed deficiently. The record does not disclose what assurances or admissions defendant may have made to his first attorney to cause him to believe that it was in defendant's best interests to tender a plea.

[5] We find without merit defendant's assertion that the actions of the second attorney constituted "state action" for constitutional purposes because attorneys are "officers of the court." Additionally, although the sheriff 's deputy is a governmental employee, defendant has not shown any prejudice or violation of his rights based on the deputy's involvement, which was limited to providing generic advice that a person who is innocent should not plead guilty.

B. Conflict of Interest

We now turn to defendant's allegation that his second attorney acquired an improper interest under MRPC 1.8.[6] Although the type of memorable or "juicy" story that sells books or movies may conflict with a defendant's best interests at trial, in this case defendant's second attorney withdrew before any harm could potentially be done. Defendant has not demonstrated that any impropriety by counsel deprived him of the effective assistance of counsel. See *Cuyler v Sullivan*, 446 US 335, 349; 100 S Ct 1708; 64 L Ed 2d 333 (1980) (a defendant must show prejudice unless he can demonstrate that "a conflict of interest *actually affected* the adequacy of his representation") (emphasis added). See, also, *Dukes v Warden*, 406 US 250, 256-257; 92 S Ct 1551; 32 L Ed 2d 45 (1972) (where the defendant could not show that his attorney's conflict of interest affected his decision to plead guilty, the plea was not rendered involuntary and unintelligent by ineffective assistance of counsel).[7]

III. Effective Assistance of Trial Counsel

Next, defendant argues that he was denied the effective assistance of counsel by the manner in which his third attorney conducted the trial.

---

[6] MRCP 1.8(d) specifically addresses a lawyer's interest in the client's literary or media rights.

[7] An attorney who attended an arbitration hearing into the sheriff's deputy's involvement in rendering advice to defendant submitted an affidavit indicating that proofs at the arbitration hearing disclosed that the second attorney's fee agreement included an assignment of book/movie/television rights. At the time the attorney withdrew from representation, he informed the court that a proposed book deal "fell through."

As noted earlier, because defendant did not make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to details of the alleged deficiencies apparent on the existing record, *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987).

A. Eliciting Damaging Testimony/Failure to Impeach

Defendant argues that trial counsel was ineffective when he elicited damaging information from the prosecution's main witness, Danny Chahine, and then failed to impeach Chahine with prior statements contradicting the damaging version. The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). A substantial defense is one which might have made a difference in the outcome of the trial. *Id.*

During cross-examination of Chahine, counsel asked about defendant's statements describing how Donald was killed. Chahine had earlier testified that defendant put his hand over Donald's mouth, but kept a passage open so Donald could breathe. Meanwhile, Billie Rogers was offering increasing sums of money for defendant's cooperation, from $25,000 to $50,000. Counsel asked Chahine about defendant's actions as Billie went for a pillow to suffocate her husband:

> *Q.* But after you indicate that Billie is becoming frustrated and she makes the

> statement from 25 to $50,000, you never hear Nicole make another statement that she put his – her hand back over Don Rogers' mouth?
>
> *A*. No.
>
> *Q*. You didn't hear a statement that [defendant] held him down so that the pillow could be placed over his head?
>
> *A*. I did hear a statement like that.
>
> *Q*. You did hear that statement?
>
> *A*. Yes.
>
> *Q*. What statement did you hear?
>
> *A*. Billie asked her to help pin him down, so that she could put the pillow on his head.

As a result of this damaging testimony, defendant argues, counsel abandoned a "mere presence" defense, which had earlier been argued in opening statements. Defendant argues that counsel should have impeached Chahine with three prior statements denying that defendant was involved in the smothering of Donald. Those prior statements consisted of the following:

> (1) A videotaped interview of Chahine by a police detective, in which Chahine stated that defendant did not say what he was doing at the time Donald was smothered;
>
> (2) Chahine's testimony at Billie Rogers' trial, in which he testified that defendant "did

> not tell me . . . if she did help her with the pillow or not;" and
>
> (3) Chahine's testimony at the preliminary examination in this matter, in which he testified that defendant told him that he stood back and did not help smother the victim.

Defendant's argument is based on several assumptions. First, he assumes that there was a discrepancy between the trial testimony and the prior versions of the events. At trial, defense counsel finished his cross-examination of Chahine with a clarification that changed the character of the allegation:

> *Q.* And at no time during the conversation [with police] did you tell Detective Tullock that while the pillow [w]as over, Nicole also indicated to you she was holding him down?
>
> *A.* No. She was holding her [sic] down during some period of time. I don't remember if while the pillow was in his face. All I remember is that Billie asked Nicole to help her pin him down.
>
> *Q.* So it could have been during the time that they were pouring alcohol down his throat?
>
> *A.* It could have been.

Because counsel succeeded in getting Chahine to concede that his impression may have been inaccurate, we cannot say that defendant was prejudiced by counsel's failure to impeach him further.

Second, defendant assumes that defense counsel was aware of the materials containing the witness' prior statements. Defendant asserts that certain statements are contained in a transcript of Chahine's videotaped interview with the police, yet he concedes that trial counsel did not have the transcript. Instead, counsel had a copy of the videotape, which may or may not have been intelligible. Defendant also has not shown that trial counsel had a copy of Chahine's testimony from Billie Rogers' trial. Indeed, it was defendant's financial inability to pay for that transcript that led his second attorney to withdraw from the case.

Third, defendant assumes that the "mere presence" theory was abandoned as a result. In fact, during opening statement defense counsel raised several potential defenses, including abandonment, mere presence, and inconsistencies between medical reports and prosecution witnesses' versions of the events. During closing argument, counsel argued that defendant abandoned the endeavor, and was shocked to return and find that Billie Rogers had suffocated her husband. There is nothing in the record to indicate that counsel failed to argue a "mere presence" defense in closing *because of the way Chahine testified*. We may not presume that counsel was ineffective. Indeed, it is possible that counsel declined to argue a "mere presence" defense because it would have diminished the credibility of defendant's version, in which defendant claimed that he was not present when his aunt suffocated the victim.[8]

---

[8] Defendant testified that Billie suffocated her husband while he was still in the bathroom, and defendant came back into the kitchen and asked Billie what she was doing. Billie immediately

B. Evidence Attacking Defendant's Character

Defense counsel elicited testimony from defendant that he had worked as an escort, but was not involved in prostitution. This opened the door for the prosecutor to ask about a pending prostitution charge against defendant. On appeal, defendant argues that counsel was ineffective for bringing out such "lifestyle" evidence rather than focusing on guilt or innocence. We disagree. Defendant had testified that he made a lot of money by running an escort service and had a boyfriend who would have paid for the $10,000 sex change operation. Although motive is not strictly an element of an offense, it is always relevant. *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). The concession of sordid details about defendant's lifestyle could have negated any financial motive, and also could have created an atmosphere of candor – especially since, as defendant argues on appeal, he made no effort to hide his sexuality from the jury. Defendant has failed to overcome the strong presumption that counsel engaged in sound trial strategy. As for the evidence that defendant was currently charged with prostitution, defendant has not shown that counsel was aware of that charge.

C. Failure to Impeach Witness

During trial, Chahine testified that defendant did not drink much. Defendant argues that this contradicted a planned intoxication defense. Defendant argues that Chahine should have been impeached with prior statements made to the police about defendant's

---

removed the pillow from the victim's face, but the victim had already stopped moving.

excessive drinking. Again, however, the record does not demonstrate, nor has defendant shown, that counsel was aware of the prior statements. Additionally, even if counsel was aware of the statements, defendant has not shown *why* counsel decided not to impeach the witness with those statements.

D. Jury Instructions and Deliberations

Defendant argues that trial counsel was ineffective for failing to request a jury instruction on the defense of abandonment, and for failing to object to the court's response to a jury note during deliberations.

Defendant has failed to identify the specific instruction he claims counsel should have requested, thereby precluding a determination whether the desired instruction would have accurately stated the law. To the extent defendant suggests that counsel should have requested CJI2d 9.4, we find no error. That instruction would have implied that defendant intended to commit the offense at one time, but "freely and completely gave up the idea of committing the crime." CJI2d 9.4(1). The instruction would have contradicted defendant's assertion that he thought Billie Rogers was joking, and was surprised to find her suffocating her husband.

Regarding the trial court's response to the jury's note, because we conclude in part VI, *infra*, that the court did not err in its response to the jury, we conclude that counsel did not err by failing to object.

E. Failure to Object to Prosecutor's Conduct

Defendant also argues that trial counsel was ineffective for failing to object to the prosecutor's arguments and tactics discussed in part IV, *infra*. Because we find no error in the prosecutor's arguments, defendant has not shown that counsel was ineffective for failing to object.

IV. Prosecutor's Conduct

Defendant next argues that the prosecutor committed at least five forms of misconduct during trial. We will consider each claim separately.

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Rice*, *supra* at 438.

A. Vouching for Credibility and Allowing Perjury

Defendant argues that the prosecutor vouched for the credibility of its primary witness and failed to disclose that perjury was being committed. In addressing comparisons between Chahine's statements to the police during the investigation, and Chahine's testimony given at trial, the prosecutor asked the officer-in-charge whether the versions were consistent:

> *Q.* Now, the information that – you heard what Mr. Chahine's testimony was over the last two days in Court, did you not?
>
> *A.* Yes.
>
> *Q.* Is that the information that he related to you at the police station in Troy on August the 30th?
>
> *A. Generally*, yes.

Defendant argues that this questioning violated his right to due process for three reasons: (1) the prosecutor failed to disclose that Chahine was lying when he implicated defendant; (2) the prosecutor failed to disclose that the officer was lying when he said that Chahine's testimony was consistent with prior statements; and (3) the prosecutor vouched for Chahine's credibility via the officer's testimony. We disagree. Defendant has not shown that any witness committed perjury. Defendant reads too much into the officer's brief response, in which the officer qualified his answer using the word "generally." The officer's testimony may be equally interpreted as conveying that Chahine was presenting a somewhat different

story in court because his testimony was only "generally" the same as information given at the police station. While a prosecutor may not ask a witness to comment on the credibility of other witnesses, he may attempt to ascertain which facts are in dispute. See *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

Defendant also argues that the prosecutor vouched for the credibility of his witnesses when he stated several times in closing argument that "we know" certain facts, and "that's what happened" and "that was the truth." Again, defendant reads these statements too broadly. Viewed in context, they constituted proper comment on the evidence, and did not suggest that the government had some special knowledge about the facts. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995) (prosecutor cannot suggest that the government has some special knowledge that a witness is testifying truthfully).

B. Shifting the Burden of Proof and Denigrating Defense Counsel

During closing argument, the prosecutor addressed the differing points of view about which evidentiary matters were the most significant:

> The medical testimony in this case is not the crux of this case. This is the crux of tis [sic] case, and Mr. Cataldo [defense counsel] did not address this. Mr. Cataldo ran from this. There's an old saying in the law is [sic] that when you have the facts on your side, you pound on the facts. And when you have the law on your side, you pound on the law. And when

> you have neither the law nor the facts on your side, you pound on the table. That's what's going on here. This was not addressed. Mr. Cataldo says that we have to look at the medical testimony and I say look at the tape [in which defendant expressed remorse for killing Rogers].

Defendant argues that these remarks improperly implied that defense counsel had a duty to address certain facts, and denigrated defense counsel by implying that he was trying to mislead the jury. Viewed in context, however, we believe the remarks reflect a proper attempt to distinguish the different points of view urged by both sides in this case. *Watson*, *supra* at 593.

C. Right to Remain Silent

Next, defendant argues that the prosecutor improperly commented upon his right to remain silent when he asked the arresting officer about statements defendant made upon his arrest in Chicago. The officer testified that he and his partner went to defendant's apartment and informed him that they had a warrant for the murder of Donald Rogers.

> *A.* At this time, Mr. Titlow, spontaneously stated, where's my aunt? Is my aunt under arrest too? At that time, we stopped her and advised her – advised him of his rights and there was no further talking to her.
>
> *Q.* Okay. And you had not asked any questions prior to Titlow making that statement, had you?

A. No, sir.

Q. You said a spontaneous utterance?

A. Yes, sir.

Q. Alright. And then after he said that, you advised him of his rights?

A. Yes, I did,

Q. But what he said was, where's my aunt? Has she been arrested too?

A. Yes, sir.

Q. Any other comment about why you were arresting him or anything like that?

A. No, sir.

Q. Just where's my aunt?

A. Is she under arrest too.

Evidence that a defendant made a statement and said nothing further does not denigrate the defendant's exercise of the right to remain silent. This isolated reference was not used to impeach defendant or to support the prosecutor's theory that defendant committed the offense and, therefore, does not support a claim of misconduct. See *People v Dennis*, 464 Mich 567, 583; 628 NW2d 502 (2001).

D. "Improper" Questioning of Defendant

Defendant argues that the prosecutor erred by asking about prior arrests not leading to convictions, defendant's sex life and preferences, and financial matters. The defense opened the door to these matters. The prosecutor did not err by asking follow-up questions testing the veracity of defendant's testimony. *People v Knapp*, 244 Mich App 361, 377-378; 624 NW2d 227 (2001) (a defendant may not introduce evidence at trial to sustain his theory and then argue on appeal that the evidence was prejudicial and denied him a fair trial).

E. Arguing Facts Not in Evidence

Finally, defendant argues that the prosecutor argued facts not in evidence when he misquoted Chahine in closing argument by stating that defendant told Chahine, "I don't know why I did it. I don't know why I held Don down while Billie smothered him. These are her words . . . two weeks after the murder." Defendant argues that he never made such a statement to Chahine. We find no error in the prosecutor's attempt to translate Chahine's testimony about defendant's statements into a first-person account by defendant. The gist of the allegations are the same: that defendant told Chahine that he did not know why he participated, and that he held the victim down. Although Chahine later distanced himself from the certainty of this testimony, the prosecutor was free to argue the inference that defendant held Donald

Rogers down during the suffocation and not merely while Billie poured liquor down his throat.[9]

V. Continuation of Prosecution

Defendant argues that his due process rights were violated when the prosecutor continued to prosecute him, despite "knowing" that he did not commit the charged offense, knew that he had "passed" a polygraph examination, and had expressed satisfaction with the plea agreement that would have resulted in a manslaughter conviction.

The authority to prosecute for violation of state law is vested solely and exclusively with the prosecuting attorney. A trial court's authority over the discharge of the prosecutor's duties is limited to those activities or decisions by the prosecutor that are unconstitutional, illegal, or ultra vires. A decision to dismiss a case or proceed to trial ultimately rests in the sole discretion of the prosecutor. Absent some reason to conclude that the prosecutor's acts are unconstitutional, illegal, or ultra vires, the prosecutor's decision whether to proceed with a case is exempt from judicial review. *People v Jones*, 252 Mich App 1, 6-7; 650 NW2d 717 (2002). If, however, a prosecutor continues to pursue charges knowing that a defendant is not guilty, the prosecutor would be committing an unconstitutional, illegal, or ultra vires act. Blackstone, Commentaries (Gavit, ed), p 807 ("[a] conspiracy to indict an innocent man of felony falsely and maliciously, who is accordingly indicted, is an abuse of public justice").

---

[9] The jury was also instructed that the arguments of counsel are not evidence.

Here, defendant has not shown that the prosecutor "knew" that he did not commit the offense. We may not infer that the prosecutor "knew" that defendant did not commit the offense from the polygraph results or from the prosecutor's willingness to negotiate a guilty plea to a lesser offense. The shortcomings of polygraph examinations are well known. *People v Barbara*, 400 Mich 352, 358-359; 255 NW2d 171 (1977). Defendant deluded himself into believing that he was a woman, and the results of the polygraph examination could also have been delusional and, therefore, unreliable.

VI. Question from Jury

Defendant argues that the trial court erred by failing to respond when the jury asked a question during deliberations. The jury's note inquired about the "malice" element of second-degree murder:

> Does someone's inaction, non-action to stop or prevent a crime resulting in death amount to fulfillment of condition three, second degree murder, knowingly creating a high risk of death, knowing that death would likely be the result of his actions?

The trial court responded, "This is a question that is up to you to decide an answer." Neither party objected on the record.[10]

We find no error in the trial court's response, and therefore no prejudice from defense counsel's failure to

---

[10] Defendant argues on appeal that an objection was made off the record. That assertion is not otherwise supported by the record. As a court of review, we must have a *record* to review.

object. First, we disagree with defendant's claim that the trial court failed to respond to the jury's question. The court responded by instructing the jury that "[t]his is a question that is up to you to decide an answer." Second, we conclude that the trial court's response was not erroneous. Defendant essentially seeks a ruling that, as a matter of law, inaction can never satisfy the malice requirement of second-degree murder. Defendant cites no authority in support of this proposition. In any event, the trial court separately instructed the jury on the elements of aiding and abetting, explaining that, in order to convict defendant of aiding and abetting murder, it was required to find that he "did something to assist in the commission of the crime," and that he "must have intended the commission of the crime alleged or must have known the other person intended its commission at the time of giving the assistance." Additionally, the court instructed the jury:

> It doesn't matter how much help, advice or encouragement the Defendant gave. However, you must decide whether he intended to help another commit the crime and whether his advice, help or encouragement actually did help, advise or encourage the crime. Even if the Defendant knew that the alleged crime was planned or being committed, the mere fact that he was present when it was committed was not enough to prove that he assisted in committing it.

Thus, the jury was properly instructed that it could not convict defendant unless it found that he actually intended and assisted in the commission of the crime.

The jury's note was not directed at the court's aiding and abetting instruction, but at the intent element of second-degree murder. In this regard, the court did not err by instructing that this fact-intensive consideration was a matter for the jury to decide. The court's response did nothing to undercut the court's earlier instructions whereby the jury was told that it could not convict defendant of aiding and abetting another unless he actually intended and assisted in the commission of the crime. Viewed as a whole, the court's instructions were not improper. See *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

VII. Cumulative Error

Finally, defendant argues that the cumulative effect of several errors deprived him of due process of law. However, because we have found no individual errors, there is no cumulative effect. See *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

Order

Michigan Supreme Court
Lansing, Michigan

Entered: May 28, 2004

Maura D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Ir.
Stephen I. Markman,
Justices

125400

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 125400
COA: 241285
Oakland CC: 01-177745-FC

VONLEE NICOLE TITLOW,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the December 11, 2003 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 28, 2004

Corbin R. Davis
Clerk

No. 10-2488

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 02, 2012
LEONARD GREEN,
Clerk

VONLEE NICOLE TITLOW,
Petitioner- Appellant,

v.

SHERRY L. BURT, Warden,
Respondent- Appellee.

Before: BATCHELDER, Chief Judge; CLAY and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Chief Judge Batchelder would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT
Leonard Green
Leonard Green, Clerk

Case No. 10-2488

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

VONLEE NICOLE TITLOW
Petitioner Appellant

v.

SHERRY L. BURT, Warden
Respondent Appellee

BEFORE: BATCHELDER, Chief Circuit Judge;
CLAY and GILMAN, Circuit Judges

Upon consideration of the appellee's motion to stay the issuance of the mandate pending application for a writ of certiorari,

It is **ORDERED** that the motion be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk
Leonard Green

Issued: August 08, 2012

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 10-2488

Filed: August 10, 2012

VONLEE NICOLE TITLOW
Petitioner - Appellant

v.

SHERRY L. BURT, Warden
Respondent - Appellee

MANDATE

Pursuant to the court's disposition that was filed 05/22/2012 the mandate for this case hereby issues today.

COSTS: None

OPPOSITION BRIEF

ORIGINAL

No. 12-414

IN THE SUPREME COURT OF THE UNITED STATES

SHERRY L. BURT, Warden, Petitioner

v.

VONLEE NICOLE TITLOW, Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

VONLEE NICOLE TITLOW
Pro Se Prisoner #384878
Richard A. Hanlon Correctional Facility
1728 Bluewater Highway
Ionia, Michigan 48846

JOHN J. BURSCH
Michigan Solicitor General
PO Box 30212
Lansing, Michigan 48909
(517) 373-1124

QUESTIONS PRESENTED

This case involves a straightforward application of *Strickland v. Washington*, 466 U.S. 668 (1984) and *Lafler v. Cooper*, ___ U.S. ___; 132 S. Ct. 1376 (2012) by the Sixth Circuit to this fact bound case. The questions presented by Petitioners are:

1. Whether the Sixth Circuit failed to give appropriate deference to a Michigan state court under AEDPA in holding that defense counsel was constitutionally ineffective for allowing Respondent to maintain his claim of innocence.

2. Whether a convicted defendant's subjective testimony that he would have accepted a plea but for ineffective assistance of counsel, is, standing alone, sufficient to demonstrate a reasonable probability that defendant would have accepted the plea.

3. Whether *Lafler* always requires a state trial court to resentence a defendant who shows a reasonable probability that he would have accepted a plea offer but for ineffective assistance, and to do so in such a way as to "remedy" the violation of the defendant's constitutional right.

TABLE OF CONTENTS

Questions Presented.....i

Table of Contents.....ii

Index of Authorities.....iii

Introduction.....1

Reasons for Denying the Petition.....2

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND OTHER FEDERAL CIRCUITS OR STATES.....2

II. THIS HABEAS CORPUS CASE PRESENTS A POOR VEHICLE BY WHICH TO DEVELOP SUBSTANTIVE PRINCIPLES OF CRIMINAL LAW.....4

III. THE DECISION BELOW CORRECTLY CONCLUDED THAT MS. TITLOW RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND PROVIDED A CASE SPECIFIC REMEDY FOR THE SIXTH AMENDMENT VIOLATION.....6

Conclusion.....7

INDEX OF AUTHORITIES

Kimmelman v. Morrison, 477 U.S. 365 (1986).....6

Kyles v. Whitley, 514 U.S. 419 (1995).....4

Lafler v. Cooper, ____ U.S. ____; 132 S. Ct. 1376 (2012).....2,3,5,6

North Carolina v. Alford, 400 U.S. 25 (1970).....5

Overton v. Ohio, 534 U.S. 982 (2001).....5

Strickland v. Washington, 466 U.S. 668 (1984).....2,4,5

Titlow v. Burt, 680 F.3d 577 (6th Cir. 2012).....2

Tory v. Cochran, 544 U.S. 734 (2005).....5

United States v. Morrison, 449 U.S. 361 (1981).....6

US Const. Amend. VI.....6

Sup. Ct. R. 10.....4

Mich. Ct. Rule 6.302(C)(3).....3,6

INTRODUCTION

This case involves the granting of a writ of habeas corpus on the basis of ineffective assistance of counsel where a substitute and now permanently disbarred attorney, Frederick Tocca, advised his client to withdraw from a plea involving a charge reduction from first degree murder (with a mandatory life sentence) to a manslaughter charge with an agreed upon sentence of seven (7) to fifteen (15) years.[1] This was not merely a plea offer it was a plea agreement that had been fully effectuated. Prior to plea withdrawal, the state trial court held a plea hearing and in compliance with all Michigan state court rules, Ms. Titlow admitted to the elements of the offense and the state trial court accepted both the charge reduction and sentence plea agreement.

This Petition for Writ of Certiorari marks the fifth time Petitioners have presented the same "substantial questions" seeking to undo the Sixth Circuit's ruling. Petitioners moved for rehearing en banc *and not a single judge voted for hearing en banc*. The rehearing request was returned to the original panel and Petitioners lost there as well. Petitioners moved for a stay while seeking certiorari and the original panel, including the dissenting judge, denied the request for a stay. Petitioners then filed a motion seeking an emergency stay of the mandate with the Honorable Justice Elena Kagan pending the filing of the instant petition for a writ of certiorari, which was also denied. Now, in a fifth attempt, Petitioners seek certiorari based in large part on Judge Batchelder's dissent in the Sixth Circuit opinion on "substantial questions" which she deemed unworthy of a stay.

---

[1] Petitioners obfuscate the role of Frederick Toca in this case and the concept of professionalism. Respondents claim at footnote 2 that Frederick Toca's acceptance of jewelry and a book deal are "irrelevant" to this appeal. Those very facts are facts which led to his permanent disbarment. Other facts were his representation to clients that he was an expert in criminal law, had an inside track with prosecutors' offices to potential clients, practicing without a license, and mismanagement of retainer fees.

REASONS FOR DENYING THE PETITION

Certiorari should be denied for three reasons. First, the Petitioners identify no conflict between the Sixth Circuit's application of *Strickland v. Washington*, 466 U.S. 668 (1984) and *Lafler v. Cooper*, ____ U.S. ____; 132 S. Ct. 1376 (2012), and the law of any state or federal circuit. Second, even if this Court were inclined to revisit *Lafler v. Cooper*, this case would present a poor vehicle to develop the law as the case below was highly fact-intensive. Third, this case is nothing more than a plea for error correction – and no error occurred. The Sixth Circuit identified the correct legal principles as set forth by this Court, applied those principles to the unique facts of this case and granted relief.

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND OTHER FEDERAL CIRCUITS OR STATES.

This Court rendered its decision in *Lafler v. Cooper* on March 21, 2012. The Sixth Circuit applied the principles set forth in *Lafler v Cooper* to the case below, *Titlow v. Burt*, 680 F.3d 577 (6th Cir. 2012), on May 22, 2012, thus the ramifications from *Lafler* have only just begun to enter the legal landscape. Petitioners cite no cases, state or federal, holding that under facts akin to this case that a conflict exists in the application of *Lafler v Cooper*.

Although Petitioners claim a conflict exists between this case and the proof required to establish prejudice in other circuits [Pet. App. at 14-18], they do not employ the term "conflict" in its ordinary sense. Ordinarily, when a litigant comes to this Court asserting the existence of a conflict, the conflict refers to a specific point of law on which courts have diverged. In other words, on the same facts, two courts would have reached a different result. Petitioners cite no cases diverging on a similar set of facts.

The facts in this case are unusual and the ruling below will have limited precedential importance. Those case facts are:

a. While represented by one attorney the defendant negotiated a plea agreement reducing a first degree murder charge to manslaughter and a sentencing benefit of avoiding a potential mandatory life sentence to a firm seven (7) to fifteen 15) year sentence.

b. Both the defense and the prosecution presented the plea offer to the state trial court and *each* expressed satisfaction with the plea to the state trial court.

c. A plea hearing was held. The defendant admitted to all of the elements of the plea offense, the prosecution expressed satisfaction with the factual basis for the plea, and the trial court *accepted* the plea of guilty to the negotiated offense and negotiated sentence - thus satisfying the State's interests as set forth in Mich. Ct. Rule 6.302(C)(3).

d. A second attorney meets with the client and without possession of the case file, prior pleadings, discussion with the first attorney, or the transcripts, moves to withdraw an existing negotiated plea because the sentence was too harsh.

Lafler v. Cooper provides a 3-part test for establishing prejudice. Petitioners *concede* that this case meets the requirements that a plea offer would have been presented to the court, that the prosecution would not have withdrawn the plea offer, the trial court would have accepted its terms, and that the conviction or sentence would have been less severe than the punishment ultimately imposed. [Pet. App. at 14-5].

Petitioners make no conflict claim as to these requirements in the Sixth Circuit's determination of these facts in this case. Instead Petitioners object to the Sixth Circuit's findings in the case below and thereby created a conflict with the requirement that the

defendant would have accepted the plea offer. Petitioners refer to a "conflict" in the sense that the court reached an incorrect conclusion in this particular case. Although there was no error, even if one occurred, this Court rarely grants review "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. "The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally . . . be denied." *Kyles v. Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting).

Certiorari should be denied.

II. THIS HABEAS CORPUS CASE PRESENTS A POOR VEHICLE BY WHICH TO DEVELOP SUBSTANTIVE PRINCIPLES OF CRIMINAL LAW.

Petitioners attempt to gain certiorari by making a narrow, case-specific argument based on misinterpretation of the opinion below that it was not ineffective assistance of counsel for an attorney to honor the client's desire to maintain innocence. [Pet. App. at 10]. They do so from the onset by stating in their introduction:

> This is an appeal of a Sixth Circuit habeas decision holding that trial counsel is constitutionally ineffective for honoring a client's desire to maintain his innocence. [Pet. App. at 3].

Whether or not an attorney is ineffective by honoring a client's protestations of innocence is not an issue in this appeal nor was there *any* such finding by the Sixth Circuit. What the Sixth Circuit found was that when at attorney utterly fails to investigate the facts of a case and then counsels the client to withdraw from an existing plea conviction without any understanding of the strength of the state's case, that attorney's performance was deficient under *Strickland v. Washington*, 466 US 668

(1984). The Sixth Circuit then applied the prejudice test set out in *Lafler v. Cooper* and found counsel's performance prejudicial as well as deficient.

Again, when the decision below identifies the correct rule of law and applies that rule of law to the particular set of facts of the case before it, certiorari is rarely granted. See *Tory v. Cochran*, 544 U.S. 734, 739 (2005) (Thomas, J., joined by Scalia, J., dissenting); and *Overton v. Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J.).

Moreover, Petitioners claim that the Sixth Circuit held that an attorney is ineffective by honoring a client's protestations of innocence is newly made and at odds with its position in all of its pleadings below. For example, in Petitioner's request for a stay made before the Honorable Justice Elena Kagan, Petitioners urged a stay because "*the Sixth Circuit did not even acknowledge a defense attorney's ethical duty to follow his client's wishes on decisions such as whether to plead guilty.*" [Petitioner's Motion to Stay Mandate, at p. 6]. Between Justice Kagan's chambers and the present application the Petitioner's complaint has shifted from a Sixth Circuit failure to consider his client's wishes to a Sixth Circuit ruling allegedly at odds with a minority of circuits.

To the extent that Petitioners want this Court to parse its ruling in *North Carolina v. Alford*, 400 U.S. 25, 33 (1970), holding that a defendant can enter a guilty plea while protesting innocence, with the facts of this case such a request is a non-starter since the attorney's basis for plea withdrawal was not innocence, but disagreement with the sentence bargained for by the prior attorney. The state court record of the plea withdrawal transcript makes it abundantly clear that it was the sentence and the sentence alone that was the reason for plea withdrawal. There is no claim of innocence in the plea

withdrawal record and dissatisfaction with the sentence was the only reason for granting defense counsel's motion to withdraw the guilty plea by the trial judge.

Certiorari should be denied.

III. THE DECISION BELOW CORRECTLY CONCLUDED THAT MS. TITLOW RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND PROVIDED A CASE SPECIFIC REMEDY FOR THE SIXTH AMENDMENT VIOLATION.

The Petitioner's belief that the Sixth Circuit decision somehow ties the hands of state court judges is mistaken. In *Lafler v Cooper* the plea had been rejected *prior* to being submitted to the judge for acceptance or rejection per Mich. Ct. Rule 6.302(C)(3). 132 S. Ct. at 1391. Unlike *Lafler v. Cooper*, Ms. Titlow had received a plea offer, accepted that plea offer, appeared in trial court where the state trial court judge exercised her discretion under Mich. Ct. Rule 6.302(C)(3) and *accepted* the terms of the plea agreement. The Sixth Circuit remedy has *not* negated the state trial court's discretion to reject the plea offer; it recognizes that the discretion has been exercised. Unlike *Lafler v. Cooper* in this case the trial court judge has already exercised its discretion under Rule 6.302(C)(3) and found the charge and sentence acceptable.

In *Lafler v. Cooper* the Court reiterated that "Sixth Amendment remedies should be 'tailored to injury suffered from the constitutional violation'" and "must neutralize the taint' of a constitutional violation[.]" [(Quoting *United States v. Morrison*, 449 U.S. 361, 364-365 (1981)]. "The Sixth Amendment mandates that the state bear the risk of constitutionally deficient assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986). The Sixth Circuit opinion does exactly that and no more.

Certiorari should be denied.

CONCLUSION

WHEREFORE, Ms. Titlow respectfully requests that the Petitioner's application for a writ of certiorari be denied.

Respectfully submitted,

VONLEE NICOLE TITLOW
Pro Se Prisoner #384878
Richard A. Hanlon Correctional Facility
1728 Bluewater Highway
Ionia, Michigan 48846

Dated: October 23, 2012.

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
NOV 9 - 2012
OFFICE OF THE CLERK

No. 12-414

In the Supreme Court of the United States

SHERRY BURT, PETITIONER

v.

VONLEE TITLOW

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Laura Moody
Appellate Division Chief

Raina Korbakis
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

Library of Congress
Law Library

TABLE OF AUTHORITIES

Page

Cases

Bousley v. *U.S.*,
523 U.S. 614 (1998) 4

Cullen v. *Pinholster*,
131 S. Ct. 1388 (2011) 6

Diaz v. *United States*,
930 F.2d 832 (11th Cir. 1991) 3

Harrington v. *Richter*,
131 S. Ct. 770 (2011) 5

Lafler v. *Cooper*,
132 S. Ct. 1376 (2012) ..... passim

Moses v. *United States*,
175 F.3d 1025, 1999 WL 195675 (8th Cir. Apr. 2, 1999) 3

Paters v. *United States*,
159 F.3d 1043 (7th Cir. 1998) 3

Strickland v. *Washington*,
466 U.S. 668 (1984) 5, 6

United States v. *Gordon*,
156 F.3d 376 (2d Cir. 1998) 3

United States v. *Morris*,
106 Fed. App'x 656, 2004 WL 1598792 (10th Cir. July 19, 2004) 3

Statutes

28 U.S.C. § 2241 et seq. 1, 4, 6

INTRODUCTION

Titlow's arguments against granting review in this case are unpersuasive.

First, Titlow claims there is no real circuit conflict presented, merely circuit decisions reaching different results based on different facts. Br. in Opp. 2–4. Not true. As the petition explains, the Sixth Circuit reaffirmed its precedent that a defendant's self-serving, post-conviction statements are enough to show that he would have accepted a plea deal. That holding is in direct conflict with five other circuits, which have correctly recognized that the courts should require objective evidence corroborating a defendant's pre-trial intent to accept a plea. Pet. 14–17. This issue is of substantial and nationwide significance following *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), which has inspired hundreds of habeas petitioners across the country to request rejected pleas after gambling and losing their criminal trials.

Second, Titlow asserts that this case presents a "poor vehicle" to address the questions presented. Br. in Opp. 4–6. Not so. This case presents an ideal vehicle to ensure that federal habeas courts appropriately defer to reasonable state-court decisions under AEDPA. Despite this Court's well-established rule that counsel is to be presumed competent, the Sixth Circuit here presumed just the opposite on the basis of a largely silent record, and it failed to defer to the reasonable findings of the state court. This case also presents an ideal vehicle to consider counsel's ethical duty to a client who maintains his innocence.

Third, Titlow argues that the Sixth Circuit did not improperly limit the discretion of the state courts under *Lafler*. Br. in Opp. 6. Not correct. In fact, Titlow fails to respond directly to Petitioner's arguments about the proper remedy under *Lafler*. This issue is of great importance because, as Petitioner and the *amici* states point out, *Lafler* does not restrict the state trial court's discretion in the manner outlined in the Sixth Circuit's ruling. As Sixth Circuit Chief Judge Batchelder explained in dissent, *Lafler* does not require the state trial court to resentence Titlow; the remedy is the government's reoffering of the original plea agreement, not a new sentence.

Certiorari is warranted.

ARGUMENT

I. This case presents a mature circuit conflict regarding the evidence needed to support a defendant's claim that he would have accepted a plea but for counsel's deficient advice.

Titlow first argues that there is no conflict between the Sixth Circuit's decision and other federal circuits, and that Petitioner merely disagrees with the Sixth Circuit's findings of fact. Br. in Opp. 2–4. But that is not so. Even accepting the Sixth Circuit's findings, they were insufficient to show that Titlow would have accepted the plea.

To show prejudice in the context of a rejected plea, a defendant must show a reasonable probability that he would have accepted the plea. *Lafler*, 132 S. Ct. at

1385. The question is what level of proof is needed to satisfy this requirement . The Sixth Circuit held that Titlow's self-serving, post-conviction statements that he would have kept his plea deal absent ineffective assistance was enough. Pet. 14–15. But at least five other circuits disagree. The Seventh, Second, and Eleventh Circuits have all held, in published opinions, that a defendant's post-conviction testimony that he would have accepted a plea offer is not sufficient, and that objective evidence of the defendant's intent is required. Pet. 16 (citing, among others, *Paters* v. *United States*, 159 F.3d 1043, 1047 (7th Cir. 1998); *United States* v. *Gordon*, 156 F.3d 376, 381 (2d Cir. 1998); and *Diaz* v. *United States*, 930 F.2d 832, 835 (11th Cir. 1991)). And the Tenth and Eighth Circuits have done the same, albeit in unpublished decisions. *Id.* (citing, among others, *United States* v. *Morris*, 106 Fed. App'x 656, 2004 WL 1598792, at *2 (10th Cir. July 19, 2004); *Moses* v. *United States*, 175 F.3d 1025, 1999 WL 195675, at *1 (8th Cir. Apr. 2, 1999)). Indeed, if objective evidence is not required, the only defendant that would be unable to assert that he would have accepted a plea deal would be a convicted defendant who is a true model of virtue, who values his integrity more than his freedom. *Lafler* did not directly address this issue, because that case involved objective evidence of the defendant's intent.

Titlow offers nothing in the way of objective evidence here. Further, Titlow does not cite to or even acknowledge in his brief in opposition the clear line of authority from the other circuits. Thus, contrary to Titlow's assertion, a fundamental conflict between the circuits on the issue of what level of proof is needed to show prejudice under *Lafler* is squarely before this

Court. And given the post-*Lafler* wave of habeas petitioners seeking to regain lost plea offers, the Court should not allow this mature circuit split to percolate any longer.

II. This case presents an ideal vehicle to ensure that federal habeas courts defer to reasonable state-court decisions, and to affirm that it is not ineffective for counsel to honor his client's desire to maintain innocence and to withdraw a plea.

Next, Titlow asserts that this case is a "poor vehicle" to address the issues presented, because the facts are unique and the Sixth Circuit's opinion will have limited jurisprudential impact. Titlow is quite mistaken.

Titlow says that this case does not involve counsel's ethical obligations regarding his client's claims of innocence, but instead involves an attorney who failed to adequately investigate and inform his client about the consequences of withdrawing a plea. While the Sixth Circuit panel majority may have made such findings, the Michigan Court of Appeals, on the record before it, found that Titlow's decision to withdraw his plea "was set in motion" not by the advice of his second attorney, Toca, but instead by Titlow's assertion of innocence. App. 101a; Pet. 10–15. The state court's finding was reasonable on the record before it. And under AEDPA, the panel majority failed to properly defer to the state-court findings.

As this Court has been forced to reemphasize repeatedly, habeas relief is an "extraordinary" remedy, *Bousley* v. *U.S.*, 523 U.S. 614, 621 (1998), and "[s]ection

2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington* v. *Richter*, 131 S. Ct. 770, 786 (2011) (internal quotation omitted). Titlow has not established that the state court misapplied this Court's precedent with respect to the law, or that the state court unreasonably applied the facts.

While the panel majority deemed Toca's performance deficient, there is no evidence to support the Sixth Circuit's finding that Toca was unfamiliar with the case or did not review the file. Pet. 12–13. Nor is there evidence that Toca did not adequately inform Titlow. Indeed, Titlow testified at his plea withdrawal hearing that he "fully under[stood] the consequences" of withdrawing his plea and did so "freely and voluntarily."[1] Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *Harrington*, the panel majority should have presumed that counsel made an informed recommendation to Titlow; instead, it presumed the exact opposite.[2]

---

[1] Titlow's understanding also came from the fact that, just a few weeks earlier, his first retained attorney had gone over all of the evidence with Titlow, advised Titlow of the elements necessary to secure a conviction, and thoroughly discussed the merits of the plea offer with Titlow. Pet. 12.

[2] This is all assuming that Toca recommended a plea withdrawal at all. Chief Judge Batchelder rightly pointed out that Titlow had not shown that his second retained attorney's advice was the reason he chose to withdraw his plea or a decisive factor in that decision. App. 26a. (Batchelder, C.J., dissenting). Rather, the "record shows that Titlow wanted to withdraw her plea before she ever enlisted Toca as counsel." App. 26a. See also Pet. 11–12.

Titlow asserts that Toca's stated reason for Titlow's plea withdrawal was not innocence, but disagreement with the sentence bargained for by Lustig. But, as Chief Judge Batchelder observed, that statement was not inconsistent with the state-court fact findings regarding Titlow's motives and Toca's performance:

> [T]he record and Titlow's own arguments . . . support the Michigan court's conclusion because they demonstrate that she chose to obtain new counsel only after she had passed a polygraph test and Detective Ott advised her that she should not plead guilty if she was not guilty. *Any advice that Titlow may have received from Toca was the result of Titlow's wanting new counsel and no longer wanting to plead guilty.* The fact that at the hearing Toca asserted a separate reason for withdrawing the plea does not undermine this conclusion. [App. 28a (Batchelder, J. dissenting) (emphasis added).]

In sum, the panel majority failed to accord deference to the state court's findings or give the state court's application of *Strickland* the "doubly deferential" review this Court requires. *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1403 (2011). As a result, this case presents the ideal vehicle to address AEDPA deference, as well as an attorney's ethical duty to a client who proclaims his innocence—an issue which, like the circuit split discussed above, takes on much greater significance post-*Lafler*.

III. *Lafler* does not restrict the state trial court's discretion in the manner outlined in the Sixth Circuit's ruling.

Finally, Titlow argues that the Sixth Circuit did not restrict the discretion of the state court under *Lafler*. Br. in Opp. 6. Again, Titlow is wrong.

In *Lafler*, this Court held that a state trial court has three options on remand: (1) vacate the convictions and resentence the defendant pursuant to the plea agreement; (2) vacate only some of the convictions and resentence accordingly; or (3) leave the convictions and sentence from trial undisturbed. *Lafler*, 132 S. Ct. at 1391; Pet. 17. As Petitioner previously argued, the Sixth Circuit here in two ways created an entirely new scheme for fashioning a *Lafler* remedy. Pet. 18–19.

First, the panel majority ordered the trial court to resentence. App. 25a (if the state reoffers and Titlow accepts the plea, "the state may then exercise its discretion to fashion a sentence"). But as Chief Judge Batchelder noted, "*Lafler* . . . does not require the trial court to resentence Titlow. Instead, *Lafler* states that once the prosecution reoffers the plea proposal, 'the judge can exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." App. 31a (Batchelder, C.J., dissenting (citing *Lafler*, 132 S. Ct. at 1389).)

Second, the panel majority directed the state trial court to fashion its sentence so as to remedy "the violation of [Titlow's] constitutional right to the effective assistance of counsel." App. 25a. But "it is not

the trial court's responsibility, as the majority states, to 'fashion a sentence for Titlow that . . . remedies the violation of her constitutional right,' as the remedy for the violation is the government's reoffering of the original plea agreement." App. 31a–32a (Batchelder, C.J., dissenting (citing *Lafler*, 132 S. Ct. at 1389).)

To the extent that the panel majority directed the state trial court to consult the initial plea agreement as a baseline in crafting a new sentence, *Lafler* does not impose such a requirement. App. 31a (Batchelder, C.J., dissenting) ("*Lafler* does not, as the majority states, *require* the trial court to consult the plea agreement.") Nor does *Lafler* suggest that further federal review looms due to any departure from the terms of the original plea offer. App. 24a–25a ("[T]he remedy articulated in *Lafler* could become illusory if the state court chooses to merely reinstate Titlow's current sentence" and "[w]hat remedy Titlow might have in federal court if such occurs is an issue to be resolved another day.").

Titlow does not even respond to the panel majority's errors, which impinge on the state trial court's discretion. Instead, Titlow tries to distinguish this case from *Lafler* because, unlike the habeas petitioner in *Lafler*, Titlow accepted but then later withdrew his plea. That factual distinction makes no difference to the remedy analysis. And, as the *amici* states explain, the Sixth Circuit's erroneous analysis is of great significance to the bench and bar in resolving *Lafler* claims going forward. Certiorari is warranted so this Court can clarify the proper *Lafler* remedy after habeas relief is granted and a case remanded to the state-court system.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Laura Moody
Appellate Division Chief

Raina Korbakis
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

Dated: NOVEMBER 2012

AMICUS CURIAE BRIEF

NOV 3 - 2012
OFFICE OF THE CLERK

No. 12-414

In The

Supreme Court Of The United States

SHERRY L. BURT,
Petitioner,

v.

VONLEE TITLOW,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE CONNECTICUT AND 18 OTHER STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

REMOVE FROM LL RR

KEVIN T. KANE
Chief State's Attorney

MICHAEL J. PROTO*
Assistant State's Attorney
Office of the Chief State's Attorney
Civil Litigation Bureau
300 Corporate Place
Rocky Hill, CT 06067
Michael.Proto@ct.gov
Tel. (860) 258-5887
Fax (860) 258-5968

*Counsel of Record

(additional counsel for amici curiae listed inside front cover)

service by
BRESCIA'S
CALL 800 842 0008

ADDITIONAL COUNSEL

FOR THE STATE OF ARIZONA:

TOM HORNE
Arizona Attorney General
Office of the Attorney General
1275 West Washington Street
Phoenix, Arizona 85007

FOR THE STATE OF COLORADO:

JOHN W. SUTHERS
Attorney General of Colorado
Colorado Department of Law
1525 Sherman Street
Denver, Colorado 80203

FOR THE STATE OF DELAWARE:

JOSEPH R. BIDEN, III
Delaware Attorney General
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801

FOR THE STATE OF GEORGIA:

SAMUEL S. OLENS
Georgia Attorney General
40 Capitol Square
Atlanta, Georgia 30334

FOR THE STATE OF HAWAI'I:

DAVID M. LOUIE
Hawai'i Attorney General
425 Queen Street
Honolulu, Hawaii 96813

FOR THE STATE OF IDAHO:

LAWRENCE G. WASDEN
Idaho Attorney General
P.O. Box 83720
Boise, Idaho 83720

FOR THE STATE OF KANSAS:

DEREK SCHMIDT
Kansas Attorney General
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612

FOR THE COMMONWEALTH OF KENTUCKY:

JACK CONWAY
Kentucky Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601

FOR THE STATE OF NEW MEXICO:

GARY K. KING
New Mexico Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87504

FOR THE STATE OF MAINE:

WILLIAM J. SCHNEIDER
Maine Attorney General
6 State House Station
Augusta, Maine 04333

FOR THE STATE OF MISSOURI:

CHRIS KOSTER
Missouri Attorney General
207 West High Street
Jefferson City, Missouri 65101

FOR THE STATE OF MONTANA:

STEVE BULLOCK
Montana Attorney General
Office of the Attorney General
P.O. Box 201401
Helena, Montana 59620

FOR THE STATE OF NEW HAMPSHIRE:

MICHAEL A. DELANEY
New Hampshire Attorney General
New Hampshire Department of Justice
33 Capitol Street
Concord, New Hampshire 03301

FOR THE STATE OF NORTH DAKOTA:

WAYNE STENEHJEM
North Dakota Attorney General
600 East Boulevard Avenue
Bismarck, North Dakota 58505

FOR THE STATE OF SOUTH DAKOTA:

MARTY J. JACKLEY
South Dakota Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501

FOR THE STATE OF UTAH:

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol Suite #230
P.O. Box 142320
Salt Lake City, Utah 84114

FOR THE STATE OF WASHINGTON:
ROBERT M. McKENNA
Washington Attorney General
1125 Washington Street SE
P.O. Box 40100
Olympia, Washington 98504

FOR THE STATE OF WYOMING:
GREGORY A. PHILLIPS
Wyoming Attorney General
123 Capitol Building
200 West 24th Street
Cheyenne, Wyoming 82002

QUESTIONS PRESENTED

1. Whether the Sixth Circuit failed to give appropriate deference to a Michigan state court under AEDPA in holding that defense counsel was constitutionally ineffective for allowing respondent to maintain his claim of innocence.

2. Whether a convicted defendant's subjective testimony that he would have accepted a plea but for ineffective assistance, is, standing alone, sufficient to demonstrate a reasonable probability that defendant would have accepted the plea

3. Whether *Lafler* always requires a state trial court to resentence a defendant who shows a reasonable probability that he would have accepted a plea offer but for ineffective assistance, and to do so in such a way as to "remedy" the violation of the defendant's constitutional right.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 5

I. Introduction 5

II. *Lafler* does not permit a defendant to evade accountability for his crime by "matching" the remedy to the prejudice of the lost plea terms 7

A. *Lafler's* remedy does not "match" the prejudice 9

B. The need for fitting punishment is a "competing interest" that ought to be taken into account in "lapsed plea" cases 12

1. The plea offer terms should not serves as the "baseline" of the *Lafler* remedy 15

2. The "baseline" of the *Lafler* remedy should be society's interest in legitimate prosecution and punishment 17

III. The Sixth Circuit's ruling offends principles of separation of powers and comity. 21

IV. CONCLUSION 25

TABLE OF AUTHORITIES

CASES **PAGE**

Apprendi v. New Jersey, 530 U.S. 466 (2000) 15

Bordenkircher v. Hayes,
434 U.S. 357 (1978). 12, 22, 23

Dorszynski v. United States,
418 U.S. 424 (1974). 13

Ebron v. Commissioner of Correction,
307 Conn. 342, ___ A.3d ___, (2012) 11

Ewing v. California, 538 U.S. 11 (2003) 18

Glover v. United States, 531 U.S. 198 (2001) 14

Kennedy v. Louisiana, 554 U.S. 407 (2008) 12

Lafler v. Cooper, 132 S.Ct. 1376 (2012) . . . . . passim

Malloy v. Hogan, 378 U.S. 1 (1964) 7

Missouri v. Frye, 132 S.Ct. 1399 (2012) . . 18, 19, 21

Oregon v. Ice, 555 U.S. 160 (2009) 13, 18, 25

Ricketts v. Adamson, 483 U.S. 1 (1987) 21

Rita v. United States, 551 U.S. 338 (2007) 14

Roe v. Flores-Ortega, 528 U.S. 470 (2000) 9

Rooyakker v. Moran, 276 Mich. App. 146 (2007) . . 24

Snyder v. Massachusetts, 291 U.S. 97 (1934) 7

Strickland v. Washington, 466 U.S. 668 (1984) . . 3, 9

Tapia v. United States, 131 S.Ct. 2382 (2011) 12

Town of Newton v. Rumery,
480 U.S. 386 (1987) 5, 7, 16, 23

Townsend v. Burke, 334 U.S. 736 (1948) 14

United States v. Des Moines Nav. & Ry. Co., 142 U.S. 510 (1892) 18, 19

United States v. Goodwin,
457 U.S. 368 (1982) 12, 15, 16

United States v. Morrison, 449 U.S. 361 (1981) 8

Williams v. New York,
337 U.S. 247 (1949) 12, 13, 15

Younger v. Harris, 401 U.S. 37 (1971) 22, 25

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amd. VI 5, 8, 9

CONN. CONST. Amd. XXIII 1

STATUTES

CONN. GEN. STAT. § 51-278(c) 1

MICH. COMP. LAWS § 750.1 et seq. 19

MICH. COMP. LAWS § 750.316 2

MICH. COMP. LAWS § 750.317 2

OTHER MATERIALS

RESTATEMENT (SECOND) OF CONTRACTS
§ 265 (1981) 24

Supreme Court Rule 37.4 1

INTERESTS OF THE *AMICI CURIAE* [1]

The *amici* states have a compelling interest in ensuring that penalties for criminal conduct meet the goals of punishment. In this case, the Sixth Circuit's interpretation of *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), results in a sentence that does not satisfy legitimate penological objectives. Specifically, the Sixth Circuit's decision limits the trial judge's discretion to impose an appropriate sentence in light of the criminal's conduct and character. *Lafler* does not contemplate such a limitation. At least one state's highest court has similarly interpreted *Lafler*. The *amici* states, therefore, have a substantial interest in this Court's determination of whether to review the Sixth Circuit's decision.[2]

STATEMENT OF THE CASE

Respondent, Vonlee Titlow, and her aunt, Billie Rogers, killed her uncle, Donald Rogers, for pecuniary gain.[3] To kill Donald, respondent and

---

[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae's* intention to file this brief.

[2] Under Connecticut law, the Chief State's Attorney serves as the equivalent of the Attorney General for criminal matters. CONN. CONST. Amd. XXIII; CONN. GEN. STAT. § 51-278(c). Therefore, Supreme Court Rule 37.4 permits the Chief State's Attorney of Connecticut, as well as the Attorneys General for the other *amici* states, to file supporting briefs on behalf of their respective states without the permission of the parties.

[3] The facts set forth in the Statement section are summarized from the decisions of the courts below, which are included in the petitioner's appendix.

Billie held him down, poured vodka down his throat, and, ultimately, smothered him with a pillow. The pair took measures to conceal their crime, and Donald's death was originally classified as natural. However, through the respondent's confession to an informant, the police learned the real story.

Respondent and Billie were arrested in January 2001 and tried separately. Respondent was charged with first-degree murder, which exposed her to a mandatory life sentence.[4] However, a plea agreement followed. In exchange for her testimony in the prosecution against Billie, respondent pleaded guilty to manslaughter and would serve seven to fifteen years incarceration. The trial court accepted respondent's plea in October 2001 and scheduled sentencing for December.

Respondent changed her mind before sentencing. She retained a second attorney and, through him, gave the State an ultimatum: Lower the sentencing range to three-to-fifteen years, or she would not testify against Billie. The State did not agree, and respondent moved to withdraw her plea. Respondent told the trial court she understood that the first-degree murder charge would be reinstated upon withdrawal of her plea. The trial court therefore allowed the withdrawal because respondent was declining to testify against Billie.

A jury convicted respondent of second-degree murder.[5] The trial court sentenced her to twenty-to-

---

[4] MICH. COMP. LAWS § 750.316.

[5] A second-degree murder conviction carries a sentence of up to life. MICH. COMP. LAWS § 750.317.

forty years of incarceration. The trial against Billie proceeded without respondent's testimony. Billie was acquitted (and later died).

In post-conviction proceedings, respondent claimed, in pertinent part, that her second attorney was ineffective for pursuing withdrawal of her plea. The claim was rejected through to the United States District Court. The District Court held that Michigan courts' rejection of the claim was neither contrary to nor an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). The court reasoned that the respondent's desire to withdraw her plea predated her second attorney's involvement, and that he was not ineffective for advising her to go to trial when she asserted her innocence.

The Sixth Circuit reversed. Applying this Court's decision in *Lafler*, supra, 132 S.Ct. 1376, the Sixth Circuit held that respondent's counsel failed adequately to investigate her case and sufficiently advise her during the plea negotiation stage. The court held that respondent was thus prejudiced by the longer sentence she received after her constitutionally sound trial.

In reaching its decision, the Sixth Circuit did not conclude that the conviction resulting from the criminal trial was not just. In fact, the Court noted that the respondent's conviction and sentence fit her crime, stating:

> The State's evidence against [the respondent] was strong. Even [the respondent's] version of the facts was

> not inconsistent with a second-degree murder conviction, and her recorded conversation with [the informant] was highly incriminating.

Pet. App. 23a.[6]

Thus, to remedy respondent's loss of the opportunity to escape the consequences of her crime of second-degree murder, the Sixth Circuit ordered respondent's release unless the State re-offers her the original plea deal. Should she accept the offer, the Sixth Circuit stated:

> [T]he state court may then exercise its discretion to fashion a sentence for [respondent] that both remedies the violation of her constitutional right to the effective assistance of counsel and takes into account any concerns that the State might have regarding the loss of [respondent's testimony] against her aunt.

In directing the state court to "fashion a sentence," the Sixth Circuit expressed that the remedy articulated by this Court in *Lafler* "could become illusory if the state court chooses merely to reinstate [respondent's] current sentence." The Sixth Circuit directed the state court to consult the initial plea agreement as a baseline in crafting a new sentence; failing to do so may result in further federal review.

---

[6] "Pet. App." refers to the petitioner's appendix.

REASONS FOR GRANTING THE PETITION

The *amici* respectfully urge the Court to grant the petition because the Sixth Circuit's decision conflicts with this Court's decision in *Lafler*, and many of the Court's precedents establishing the imperative that punishment fit the crime and the criminal.

This case raises a question not directly addressed in *Lafler* – to what extent does the Sixth Amendment remedy require ignorance of a result that justly reflects the crime and the criminal's character, in order to recapture plea terms more favorable to a defendant but forfeited due to counsel error.[7] This is a question of great importance to the administration of criminal justice. See *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) (granting certiorari because case "raise[d] a question important to the administration of criminal justice.").

I. Introduction

The *amici* support the petitioner's argument that *Lafler* does not restrict the state court's discretion in the manner outlined in the Sixth Circuit's ruling. Specifically, *Lafler* does not demand that the state court "fashion a sentence" by consulting the initial plea agreement as a baseline, or that further federal review looms because any

---

[7] Because the *amici* focus on the *Lafler* remedy, it is assumed only for purposes of this brief that there has been counsel error. That assumption is not by any means a concession regarding counsel's performance in this case.

departure from the terms of the original plea offer has constitutional implications. *Lafler* avoids this restrictive approach for good reason. The Sixth Circuit's remedy persuades the trial court to give to a defendant the forfeited terms of the plea agreement, but that remedy "cause[s] serious injustice." *Lafler*, supra, 132 S.Ct. at 1398 (*Alito, J.*, dissenting).

The *Lafler* approach is nuanced and perhaps novel. It employs a rare exception to the general rule that the remedy for ineffective assistance of counsel should "match" the prejudice resulting from it, if "competing interests" dictate otherwise. Thus, where, as here, a court seeks to impose a remedial sentence equal to the sentence contemplated by the plea offer, without regard to those competing interests, the result is that the sentence similarly does not "match" the crime and the criminal. The Sixth Circuit acknowledged that the conviction of second-degree murder was fitting. Pet. App. at 23a. Regardless, it ordered that the trial court fashion a sentence with the plea to the lesser charge of manslaughter as its baseline.

Consequently, the Sixth Circuit's ruling fails to achieve an appropriate balance in the administration of criminal justice.

> Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

Snyder v. Massachusetts, 291 U.S. 97, 122 (1934), *overruled in part, on other grounds, Malloy v. Hogan*, 378 U.S. 1 (1964); *see also*, *Rumery*, supra, 480 U.S. at 400 (*O'Connor, J.*, concurring) ("The public has an interest in seeing its laws faithfully executed."). The Sixth Circuit's ruling impedes full execution of the public's laws and disrespects crime victims.

Allowing respondent to escape the proof of her crime of second-degree murder is at odds both with *Lafler* and with myriad precedent from this Court. In addition, the mechanism by which respondent is permitted to evade full accountability is a judicial order requiring the State to extend a plea offer it never made in the first place – one that does not (indeed, cannot) require respondent's testimony at Billie's trial. Thus, the Sixth Circuit's remedy offends principles of separation of powers and comity.

II. *Lafler* does not permit a defendant to evade accountability for his crime by "matching" the remedy to the prejudice of the lost plea terms.

The *Lafler* remedy is a clear balance; it is not required to "match" the prejudice. Instead, it addresses constitutional prejudice while not conferring a windfall upon a defendant. *Lafler*, supra, 132 S.Ct. at 1388-89. In the "lapsed plea" context, a "windfall" results if a defendant is granted punishment embodied in the original plea offer even if it does not fit his crime and character. To avoid such a perverse result, *Lafler* reconciles its remedy to the prejudice of the lost plea terms through

consideration of "competing interests" – something that the Sixth Circuit here failed to do.

The Court in *Lafler* began its remedy discussion by stating that:

> Sixth Amendment remedies should be "tailored to the injury suffered from the constitutional violation *and should not unnecessarily infringe on competing interests.*"

Lafler, supra, 132 S.Ct. at 1388 (quoting *United States v. Morrison*, 449 U.S. 361, 364 (1981)) (emphasis added). Thus, although the remedy should seek to "neutralize the taint" it should "not grant a windfall to the defendant . . . ." *Id.*

The principle that "competing interests" ought to be considered in remedying a violation of the right to the effective assistance of counsel is not a new one. It is a principle adopted by the Court at least three decades ago in the *Morrison* decision. However, the Court has not expounded the principle or identified specific interests that should be taken into account in crafting a remedy that may not completely equal the prejudice. The need for dispositions in criminal cases that serve penological goals by imposing punishment that fits the crime and the criminal is so deeply recognized that it *must* constitute a "competing interest" to be taken into account in remedying lapsed pleas.

A. *Lafler's* remedy does not "match" the prejudice

Typical ineffective assistance of counsel cases involve claims related to counsel's performance in the course of legal proceedings (such as at trial, sentencing, or on appeal). *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). *Strickland* itself was one such case. *Strickland*, supra, 466 U.S. at 691-92 ("The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."). In these cases, the proceeding in question is presumed reliable and a defendant must show how counsel's error caused the proceeding to be "unreliable." *Flores-Ortega*, supra, 528 U.S. at 483.

In some unusual cases, the claim is not that counsel's error led to a proceeding of disputed reliability, "but rather to the forfeiture of a proceeding itself." *Id.* *Flores-Ortega* is the classic example. There, counsel failed to file appeal papers, and that "deprived respondent of more than a *fair* judicial proceeding; that deficiency deprived respondent of the appellate proceeding altogether." *Id.* (emphasis in original). A presumption that a "proceeding" is reliable is invalid because no proceeding ever took place. *Id.* (citations omitted). Thus, the *Flores-Ortega* defendant needed only to show that, but for counsel's deficient performance, he would have appealed. If shown, the defendant's right to appeal would thus be restored. The remedy, therefore, matches the prejudice. It restores the defendant's ability to undertake the lost proceeding

– the appeal. Of course, it does not guarantee the defendant that he will prevail in that appeal.

Lafler's remedy treats the "lapsed plea" scenario as though it falls within this small class of "unusual cases" where a defendant has been deprived of "the proceeding itself" – the proceeding at which the court would have determined whether his plea represents an appropriate disposition. The remedy restores a defendant's opportunity after trial to have the trial court consider whether he should receive the plea disposition. However, regardless whether there involved sentence or charge bargaining, *Lafler* leaves to the trial court's discretion whether to impose the plea disposition, the trial disposition, or something else. *Lafler*, supra, 132 S.Ct. at 1389.

Lafler's wisdom, therefore, is that its remedy does not prevent a trial court from considering all pertinent information to impose a sentence that fits the crime and the criminal's character. Indeed, the trial court may leave undisturbed the trial outcome if that is what is necessary toward achieving an *appropriate* disposition. Thus, a trial court need not disregard information "concerning the crime" that arose after the plea offer was made, and can consider a defendant's acceptance of responsibility. *Id.*

Hence, just as where an attorney's error causes the forfeiture of an appellate *proceeding*, as in *Flores-Ortega*, *Lafler* restores a defendant's opportunity to have a proceeding – the proceeding at which the trial court considers his plea. But, *Lafler* no more guarantees a particular outcome at that reinstated plea proceeding than *Flores-Ortega*

guarantees a "win" on a reinstated appeal. If, then, the prejudice in the "lapsed plea" scenario were expressed as being the loss of "the proceeding itself," there may be little confusion. The remedy of restoring that proceeding would "match" the prejudice of having lost the opportunity for it.

But, the prejudice in the *Lafler* scenario is said to be – not the loss of the plea proceeding that never occurred – the loss of the plea agreement's favorable terms. *Lafler*, supra, 132 S.Ct. at 1386 ("the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence."). Courts, therefore, appear to struggle with a remedy that does not seem to "neutralize the taint" because it is mismatched to the prejudice. As the Connecticut Supreme Court, construing *Lafler*, stated just last week:

> If the [defendant] was prejudiced because it is reasonably probable that the sentence embodied in the plea agreement would have been imposed if not for the deficient performance of counsel . . . it seems reasonably clear that the appropriate remedy is to impose that sentence.

Ebron v. Commissioner of Correction, 307 Conn. 342, ___ A.3d. ___, (2012).

This view is behind the Sixth Circuit's remedy in this case. It causes the Sixth Circuit to "remain concerned that the remedy articulated in *Lafler* could become illusory . . . ," Pet. App. 25a

(presumably because the court believes the remedy should recapture the loss of the shorter sentence), and it is the reason the court directed lower courts to "consult" the initial plea agreement in "fashion[ing] a sentence" – things that *Lafler* does not prescribe. This Court should reject this approach because, as in this case, it promises to result in criminal case dispositions that ignore the factual bases of crimes and fail to achieve legitimate penological goals.

B. The need for fitting punishment is a "competing interest" that ought to be taken into account in "lapsed plea" cases

"The imposition of punishment is the very purpose of virtually all criminal proceedings." *United States v. Goodwin*, 457 U.S. 368, 372 (1982). Accordingly, criminal punishments that fit the criminal's conduct and character have generally withstood constitutional challenge. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (no due process violation where prosecution enhanced charges following breakdown in plea negotiations, because defendant was legitimately subject to prosecution for the enhancement based upon his conduct). A fitting punishment is one that serves the penal goals of retribution, deterrence, incapacitation, and rehabilitation. *See Tapia v. United States*, 131 S.Ct. 2382, 2387 (2011); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008).

In order to advance the purpose and goals of punishment, a substantial amount of discretion is vested in the criminal judge, who is in the best position to devise a fitting sentence. In *Williams v.*

New York, 337 U.S. 247 (1940), the Court recognized the importance of this discretion in order to:

> Determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant – if not essential – to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. . . . Undoubtedly, the [sentencing statutes at issue in *Williams*] *emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.*

Id. at 247 (emphasis added); *see also*, *Oregon v. Ice*, 555 U.S. 160, 163, 171 (2009) (recognizing continuing common law tradition of entrusting trial judges with "unfettered discretion" to consider the offense or the defendant's character at sentencing). Thus, a sentence based upon less than full information, such as that information included in pre-sentence investigation reports, is not conclusively appropriate. *Williams*, supra, 337 U.S. at 247-48.

In fact, so important is a judge's exercise of sentencing discretion that this Court has stated that, as long as the sentence is within the range set by statute, "appellate review is at an end." *Dorszynski v. United States*, 418 U.S. 424, 431 (1974). Indeed, the *Lafler* "lapsed plea" scenario is the only context in which a "harsher sentence" that is nonetheless within the legal range is said to be constitutional

prejudice. *See Townsend v. Burke*, 334 U.S. 736, 741 (1948); *Glover v. United States*, 531 U.S. 198 (2001) (finding constitutional significance in "harsher sentence" that was also an *illegal* sentence).

Recently, in *Rita v. United States*, 551 U.S. 338 (2007), the Court re-affirmed the principle that sentencing judges are best positioned to devise punishments that consider the offense and offender characteristics in light of punitive goals. *Id.* at 347-48. Construing federal sentencing guidelines, the Court held that the Constitution is not offended even if a sentence falls outside the "heartland" to which the guidelines apply if it is warranted by the facts of the case – even when a judge considers factual matters not determined by the jury. *Id.* at 351-52. In holding that constitutional implications arise in the lapsed plea context when the sentencing court, on remand following a finding of ineffective assistance of counsel, imposes a sentence greater than that involved in the earlier plea bargain, the Sixth Circuit eclipsed this range of consideration typically afforded the trial judge.

The Sixth Circuit's ruling burdens a judge's discretion in devising a punishment that fits the criminal and his crime. It instructs him to use the plea offer terms as his baseline without consideration of the societal interest in legitimate prosecution and punishment embodied in statutory penalties. *Lafler* does not upend the goals of punishment by fixing at the plea terms the standard for the sentence a defendant *should* receive.

1. The plea offer terms should not serve as the "baseline" of the *Lafler* remedy

The Court has continued to affirm the principle that sentences should appropriately match the crime and the criminal. *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (citing *Williams*, supra). Setting the "baseline" at the terms of the plea offer, as the Sixth Circuit has, is inconsistent with this principle. In fact, the Court has explicitly stated that the prosecutor's initial decision at the plea offer stage "should not freeze future conduct. . . . [T]he initial charges filed by the prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution." *Goodwin*, supra, 457 U.S. at 382.

> In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized.

Id. at 381. For that reason, "[a]n initial indictment from which the prosecutor embarks on a course of plea negotiation does not necessarily define the extent of the legitimate interest in prosecution." *Id.* at 380.

The Court's observation in *Lafler* that the original plea offer may have involved "a sentence the prosecution evidently deemed consistent with the sound administration of criminal justice," *Lafler*, supra, at 1387, does not overrule *Goodwin*. The Court stopped short of requiring a remedy that imposes those plea terms, inherently recognizing its earlier observation that consideration of "competing interests" may lead to the conclusion that the plea terms do not "reflect the extent to which an individual is legitimately subject to prosecution." *Goodwin*, supra, at 382.

Such is the case, for example, where a prosecutor makes a compromise offer in light of a sexual assault victim's reticence to relive her ordeal and testify at trial, or when parents of a minor victim of sexual assault wish not to subject their child to greater trauma. *See*, e.g., *Rumery*, supra, 480 U.S. at 390 (recognizing prosecution's desire to protect sexual assault victim "from the trauma she would suffer if she were forced to testify" as motive for agreeing to disposition); *see also*, *Id.* at 403 (*O'Connor, J.*, concurring) (victim's "emotional distress," among other things, supported prosecutor's judgment regarding disposition). In this kind of case, the plea offer does not reflect the severity of the crime, but, rather, is acceptable insofar as it at least imposes *some* punishment – it seeks in *some* measure to address the goals of sentencing – while at the same time respecting the concerns of the victims and acknowledging the reality that strong evidence is not always accompanied by strong witnesses. If the plea offer is rejected (even if because of counsel's error of which neither the State nor the victim is aware) and the victim then collects

the wherewithal to testify and a conviction is had, the punishment meted out after trial represents the true value of the crime, even if the plea offer contained a discount.

Lafler's remedy responds to the question whether the person with a ten year sentence is enjoying a discount or the person with a twenty year sentence is paying a premium. The trial judge can consider many factors in arriving at the sentence that serves society's interest in legitimate prosecution -- without the burden of "consulting the plea offer as a baseline," as the Sixth Circuit instructed.

2. The "baseline" of the *Lafler* remedy should be society's interest in legitimate prosecution and punishment.

Contrary to the Sixth Circuit's interpretation, *Lafler* upholds the tradition of imposing punishment that fits the crime and the criminal. Historically, this was accomplished by devising a sentence that fits the facts of the crime and the criminal's character in light of societal standards embodied in sentencing legislation.

The "baseline" for determining sentence after a finding of ineffective assistance in the "lapsed plea" context must continue to be statutory penalties that embody society's determination of appropriate punishments. "Beyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign

status." *Ice*, supra, 555 U.S. at 170. Thus, the court has recognized that:

> [L]egislatures have primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme. We do not sit as a 'superlegislature' to second-guess these policy choices.

Ewing v. California, 538 U.S. 11, 28 (2003).

The Court did not overrule this principle in observing, in *Missouri v. Frye*, 132 S.Ct. 1399 (2012), the companion to *Lafler*, that:

> Defendants who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes.

Frye, supra, 132 S.Ct. at 1407. The Court left the trial judge with discretion to consider whether a statutory penalty may be inflated, but did not trump the historical rule that courts "must assume that legislative discretion has been properly exercised. If evidence was required [for example, to show that a particular crime warrants a particular sentence] it must be supposed that it was before the legislature when [the legislation passed]."[8] *United States v.*

---

[8] There is no evidence in the record of this case from which to conclude that Michigan's legislature has artificially inflated the punishment attendant to this defendant's crime in order to

Des Moines Nav. & Ry. Co., 142 U.S. 510, 544 (1892).

Nor did the Court dispense with the longstanding tradition that punishments should be proportional to crimes when it observed, in *Frye*, that the "system of pleas" gives rise to the potential for disparate sentencing between defendants who plead out and defendants who go to trial. *See Frye*, supra, at 1407 (quotation and brackets omitted) ("horse trading between prosecutor and defense counsel determines who goes to jail and for how long."). Quite to the contrary, the Court left discretion in the trial judge specifically to devise a proportional sentence that need not equal the lost plea terms.

Ultimately, the *Lafler* remedy allows the criminal trial court to determine whether to impose the sentence involved in the plea agreement, the sentence imposed after trial, or something else. This remedial rule is consistent with this Court's sentencing jurisprudence. It permits the trial court to consider those concerns discussed in *Lafler* – that a statutory sentence may be inflated, or that the post-trial sentence may be disproportionate to those imposed on similar defendants who pleaded guilty. But it also permits the trial judge to adhere to the longstanding presumptions that prosecutors, legislators, courts and jurors have acted in good faith toward a proper conclusion. *See*, e.g., *Des Moines*

---

allow "buffer" for bargaining down to its true worth. In fact, Michigan's legislature has enacted a complex statutory sentencing scheme expressly recognizing the purposes of punishment. MICH. COMP. LAWS. § 750.1, et seq.

Nav. & Ry. Co., supra, at 544 ("It is conclusively presumed that a legislature acts with full knowledge, and in good faith.").

But for *Lafler's* remedy allowing for consideration of "competing interests," the case could be seen as overruling, *sub silentio*, these and other historical principles. For example, although *Lafler* does find prejudice when "the trial caused the [constitutional] injury," *Lafler*, supra, 132 S.Ct. 1386, it does not overturn the effect of the Court's pronouncement of sixty years ago that:

> There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

Frisbie v. Collins, 342 U.S. 519, 522 (1952).

Instead, what links the present to the past in this situation is the *Lafler* remedy. By continuing the tradition of vesting in the trial judge the discretion to consider "competing interests" in determining the remedy, the *Lafler* remedy prevents a "guilty person rightfully convicted" from escaping justice. In contrast, the Sixth Circuit's order to the trial court to "fashion a sentence . . . that . . . remedies the violation" holds promise to do just that by ignoring the competing interest of whether the disposition fits the crime and criminal.

III. The Sixth Circuit's ruling offends principles of separation of powers and comity

This case raises another novel question: What is the remedy in the lapsed plea context when the plea agreement at issue obligates a defendant to do something more than plead guilty, but performance of that obligation is no longer possible? The plea agreements at issue in *Lafler* and *Frye* merely required those defendants to plead guilty, thus saving the State the cost of trial. But, here, the agreement required the defendant's testimony at a trial against Billie, who was later acquitted.

The defendant in *Ricketts v. Adamson*, 483 U.S. 1 (1987), had agreed to testify against co-defendants. He later gave the State an ultimatum – he would only testify if certain additional conditions were met. *Id.* at 4. The State did not acquiesce, and he declined to testify. The trial judge explained to the *Rickett's* defendant that a breach would return the parties to the *status quo ante*. *Id.* at 9-10. He nonetheless declined to testify. When the State again charged him with the crime that was extinguished as part of the defunct plea bargain, the *Ricketts* defendant cried foul on double jeopardy grounds. The Court rejected the constitutional claim because "[t]he State did not force the breach" and because the defendant was made aware at the plea hearing of the consequences of that breach. *Id.* at 11-12. The *Ricketts* defendant's later offer to provide testimony did not save his case, because the parties had already been returned to their former positions. *Id.* at 12.

Here, under strikingly similar facts, the Sixth Circuit has charted a different course. It has ordered the State to re-offer an impossible arrangement, and directed the trial court to adjust the end result by whatever value it places on that impossibility ("the state court may then exercise its discretion to fashion a sentence . . . [that] takes into account any concerns the State might have regarding the loss of [the respondent's] testimony").

In itself, that is an inappropriate directive. As the Sixth Circuit acknowledged, the primary benefit the State sought through the agreement was unrelated to respondent's case – the State sought to benefit from respondent's testimony *in its case against Billie*. Thus, to "take account" of the loss of that benefit in sentencing respondent would penalize her – *not because of her crime* – because *Billie* walked free. Even if the approach were appropriate, it would not give the State any measure of recompense for the loss of the benefit it sought through the agreement.

In substance, the Sixth Circuit has ordered the State to extend a plea offer it never contemplated and forces the State to forego entirely the advantage it sought. *See Bordenkircher*, supra, 434 U.S. at 363 ("Plea bargaining flows from the 'mutuality of advantage' to defendants and prosecutors . . . ."). The ruling thus violates principles of separation of powers and comity.

Prosecutors, not the courts, "are charged with the duty of prosecuting offenders against the laws of the State, and must decide when and how this is to be done." *Younger v. Harris*, 401 U.S. 37, 45 (1971).

For that reason, the Court has stated that its cases "uniformly have recognized that courts normally must defer to prosecutorial decisions as to whom to prosecute." *Rumery*, supra, 480 U.S. at 396.

> Prosecutorial charging decisions are rarely simple. In addition to assessing the strength and importance of a case, prosecutors also must consider other tangible and intangible factors, such as government enforcement priorities. . . . [T]hey also must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge. Because these decisions are not readily susceptible to the kind of analysis the courts are competent to undertake, we have been properly hesitant to examine the decision whether to prosecute.

Id. (all quotations, citations and footnotes omitted); *see also*, *Bordenkircher*, supra, 434 U.S. at 364 (charging decisions rest entirely in prosecutor's discretion).

The prosecutor thus weighed the value of respondent's testimony in Billie's case in light of his priorities, resources, and these other considerations, and decided to enter the agreement. But for the State's "major benefit" of that testimony, the State may not have made an offer at all, or it may not have come down off the higher charge. In order to determine the value of the loss of that testimony, the court would have to supplant its views for those of

the prosecutor in considering all the factors that went into the decision to enter the agreement – an analysis this Court has recognized as an executive function, and one that courts are not "competent to undertake." Thus, for the court to decide the value to the State of respondent's testimony in Billie's case would violate separation of powers principles.

Moreover, entering into the plea agreement was a legitimate state activity. It is not possible to revive that agreement at this time, because its purpose has been frustrated. Michigan has adopted the frustration-of-purpose doctrine. *Rooyakker v. Moran*, 276 Mich. App. 146, 159 (2007). That doctrine states:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language of the circumstances indicate to the contrary.

REINSTATEMENT (SECOND) OF CONTRACTS § 265 (1981).

The prosecutor entered into the agreement on the basic assumption that respondent would testify against Billie. That purpose was frustrated by respondent's declination to testify. Under Michigan law, the prosecutor is discharged from his obligations. The Sixth Circuit nonetheless ordered

the State to enter into a wholly new and different agreement. That order interferes with the State's sovereignty, and violates principles of comity. *See Younger*, supra, 401 U.S. at 44; *Ice*, supra, 555 U.S. at 168.

IV. CONCLUSION

The petition should be granted.

Respectfully submitted,

KEVIN T. KANE
Chief State's Attorney
State of Connecticut

MICHAEL J. PROTO
Assistant State's Attorney
Counsel of Record
Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, Connecticut 06067
Counsel for Amici Curiae

November 5, 2012

JOINT APPENDIX

RECORD
AND
BRIEFS

No. 12-414

In the Supreme Court of the United States

SHERRY L. BURT, PETITIONER

v.

VONLEE TITLOW

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

Valerie Newman
Counsel of Record
State Appellate Defender
Office
Penobscot Bldg., Ste. 3300
645 Griswold Street
Detroit, MI 48226
vnewman@sado.org
(313) 256-9833

Attorney for Respondent

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor
General
Counsel of Record
P.O. Box 30212
Lansing, MI 48909
BurschJ@michigan.gov
(517) 373-1124

Attorneys for Petitioner

Petition for Writ of Certiorari Filed October 2, 2012
Certiorari Granted February 25, 2013

Library of Congress
Law Library

TABLE OF CONTENTS

Relevant Docket Entries
from the United States District Court
for the Eastern District of Michigan
Docket No. 2:07-cv-13614-MOB-VMM 1

Relevant Docket Entries from the
United States Court of Appeals
for the Sixth Circuit
Docket No. 10-2488 2

Michigan Court of Appeals
Case No. 241285
Transcript of Danny Chahine videotape interview
August 30, 2000
Pages 29–30, 35–41 3–17

Oakland County Circuit Court
Case No. 01-177745-FC
Transcript of Chahine/Titlow audiotape
September 1, 2000
Pages 11–20 18–32

Oakland County Circuit Court
Case No. 01-177745, 6 FC
Motion hearing transcript
August 1, 2001
Pages 21–22 33–36

Michigan Court of Appeals
Case No. 241285
Polygraph Examination Report
October 25, 2001 37–40

Oakland County Circuit Court
Case No. 01-177745-FC
Transcript of plea proceedings
October 29, 2001
Pages 4–15 41–53

Oakland County Circuit Court
Case No. 01-177745-FC
Written plea form dated
October 29, 2001 54–57

Michigan Court of Appeals
Case No. 241285
Retainer Agreement
November 26, 2001 58–61

Oakland County Circuit Court
Case No. 01-177745-FC
Transcript of motion proceedings
November 29, 2001
Pages 3–15 62–75

Oakland County Circuit Court
Case No. 01-177745-FC
Transcript of motion proceedings
December 19, 2001
Pages 3–4 76–78

Oakland County Circuit Court
Case No. 01-177745-FC
Transcript of motion proceedings
February 6, 2002
Pages 3–11 79–87

Oakland County Circuit Court
Case No. 01-177745-FC
Transcript of trial proceedings
March 12, 2002
Pages 2, 40, 43–49, 52–57, 62–64, 80–81,
101–103, 119–121, 140–141, 151–152,
166, 172–177, 199, 201–208, 211,
216–226, 228, 233–235, 241–243,
247–248, 250–251 88–167

Oakland County Circuit Court
Case No. 01-177745-FC
Transcript of trial proceedings
March 14, 2002
Pages 2, 14–15, 94–101, 104, 176–177,
195–201, 206–212, 214–223, 226–235,
247–250, 254–257 168–227

Oakland County Circuit Court
Case No. 01-177745-FC
Transcript of trial proceedings
March 15, 2002
Pages 2, 48–49, 71–72, 97, 106–109,
124–128, 155–157, 160–161 228–250

Oakland County Circuit Court
Case No. 01-177745-FC
Transcript of trial proceedings
March 18, 2002
Pages 2, 16, 63, 68, 130–131, 133, 136–144,
154, 157–160, 164–165, 195, 204, 206 251–279

Oakland County Circuit Court
Case No. 01-177745-FC
Transcript of trial proceedings
March 19, 2002
Pages 2, 16–19, 23–26, 30, 32 280–289

Oakland County Circuit Court
Case No. 01-177745-FC
Transcript of Sentencing
April 17, 2002
Pages 20–23, 25–27 290–296

Michigan Court of Appeals
Case No. 241285
Affidavit of William Pierson
October 25, 2002 297–299

Michigan Court of Appeals
Case No. 241285
Affidavit of Richard Lustig
November 19, 2002 300–301

Sixth Circuit Court of Appeals
Case No. 10-2488
Attorney Discipline Board
Case Nos. 08-22-AI; 08-85-JC; 08-140-GA
Order and Opinion
Issued July 30, 2010 302–317

Oakland County Circuit Court
Case No. 01-177745-FC
Transcript of hearing
October 31, 2012
Pages 14, 19–25 318–327

The following opinions and order have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Michigan Court of Appeals
Order Affirming Conviction
Issued December 11, 2003 ..... 98a–119a

Michigan Supreme Court
Order
Issued May 28, 2004 ..... 120a

United States District Court –
Eastern District of Michigan
Opinion and Order Denying Petition
Issued October 19, 2010 ..... 34a–97a

United States Court of Appeals
For the Sixth Circuit
Opinion
Issued May 22, 2012 ..... 1a–32a

United States Court of Appeals
For the Sixth Circuit
Judgment
Issued May 22, 2012 ..... 33a

United States Court of Appeals
For the Sixth Circuit
Order Denying Petition for En Banc Rehearing
Issued August 2, 2012 ..... 121a

United States Court of Appeals
For the Sixth Circuit
Order Denying Request to Stay Mandate
Issued August 8, 2012 ..... 122a

United States Court of Appeals
For the Sixth Circuit
Mandate
Issued August 10, 2012 ..... 123a

Relevant Docket Entries from the United States District Court for the Eastern District of Michigan Docket No. 2:07-cv-13614-MOB-VMM

8/28/2007	1	Petition for writ of habeas corpus filed by Vonlee Titlow
11/21/2007	5	Supplemental brief regarding motion to reopen case
6/3/2008	11	Response to petition for writ of habeas corpus
7/17/2008	14	Reply to response filed by Vonlee Titlow
10/19/2010	26	Opinion and order denying petition for writ of habeas corpus and issuing a certificate of appealability
10/19/2010	27	Judgment in favor of respondent against petitioner
11/15/2010	28	Notice of appeal by Vonlee Titlow

Relevant Docket Entries from the United States Court of Appeals for the Sixth Circuit Docket No. 10-2488

1/28/2011	9	Appellant brief for Vonlee Titlow
3/16/2011	12	Corrected appellee brief for Sherry Burt
3/18/2011	16	Reply brief for Vonlee Titlow
3/27/2012	22	Additional citation for Vonlee Titlow
4/9/2012	23	Additional citation for Sherry Burt
5/22/2012	24	Opinion and judgment filed: reversed
6/19/2012	28	Petition for en banc rehearing
8/2/2012	31	Order filed denying petition for en banc rehearing
8/6/2012	32	Motion filed to stay mandate
8/8/2012	33	Order filed denying motion to stay mandate

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-appellee,	)	
-vs-	)	
VONLEE NICOLE TITLOW, Defendant-appellant.	)	COA 241285 LC 01-177745 FC

Transcription of a videotaped interview of DANNY CHAHINE, taken at the Troy Police Department on Wednesday, August 30, 2000.

SW is Sgt. Whiteside
W is the witness Danny Chahine
D is Detective Tullock

* * *

[Page 29]
{W} pay attention to what the police is writing down on the report? Because she didn't tell me ***if somebody's telling you the man is dead and she's telling me that the police wrote down in the report those things. I'm like why would you pay attention of what the police was doing, Nicole? I said Nicole, what did you guys do? She's like oh, I'll tell you all about it later.

D When you indicated that Nicole was crying and drunk, it's approximately noon, I mean, could you understand what she was telling you? Was she understandable?

W Oh, she wasn't like drunk like she couldn't talk.

D Okay. I guess that's what I'm getting at.

W Because she drinks constantly.

D So you can clearly understand what she was saying to you?

W Uh-huh.

D And she wasn't, you know, she was--what was her demeanor? Was she serious or joking?

V No, she was serious from what I could hear.

D Right.

W I can't see her, she's talking to me on the phone.

D Your impression was she was serious?

W Serious and crying.

D And crying. Okay. And you asked what did you guys do?

W Because the fact I asked what did you guys do because before she mentioned that her aunt mentioned to her jokingly that she would pay $25,000 to get rid of Don.

D And when would Nicole mention this to you approximately?

W Before that, like a couple days before that.

D Okay.

W And I'm like okay, that conversation happened in the parking lot of the casino or in the casino, I don't remember. I mean, I'm like okay, let's say she paid $25,000 to you, she said

[Page 30]
she offered me $25,000. I'm like let's say what would you do, she say I would give him a pill or something and that was it. And I took it off my mind, she just joking about that.

D In hindsight, that conversation, could it have been that she wasn't joking? I mean, did she present it to you in a joking fashion or did you perceive it—

W In a joking fashion. But it feels like there was something serious in there and that's why my reply to her was when she called me that he's dead on the floor, they found him dead on the floor, I'm like what did you guys do?

D 'Cause you relate it to that conversation you had earlier?

W Yes.

D And the concern with the police?

W And the concern being what the police wrote down in the report. Why would you be concerned of what the police wrote down if you, you know what I'm saying. That's why I asked her.

D Going back to the conversation about the $25,000, what do you specifically remember her saying about $25,000?

W Her aunt was jokingly saying to her that she would pay $25,000 to get rid of him, meaning Don.

D Did they express, anybody express any other concern or mention about this $13,000 Visa bill after that original big fight that you heard of?

W No, all I heard is that he wanted her to write him a check and that's all.

D And what was the terminology about the $25,000? What would happen to Don, I mean, what do you remember her saying, we're paying $25,000 to--

W To get rid of 'em

D Was that the term that she used?

W Uh-huh.

* * *

[Page 35]
W No. You know what, the thing is, I do take a card to their one night, I don't use it and I save and the next night I ask for another one and then I use 'em both *** because I didn't think they will give me two together or and I don't want to push it too much.

D Sure, one person asking for two.

W So what I'll do, I'll save one from before and so I use other ones so this way--

D And what, would that have been a buffet restaurant that you took her to?

D Yeah.

W So you guys the night, later the night of Don's death or the night after you went to the buffet with Nicole, right?

W Yes.

D What's the name of that buffet, do you remember?

W It's only one down in the casino.

D You don't remember what floor that's on? I've been there--

W Basement.

D Basement. Approximately, and I know it's hard to say, approximately what time would that have been that you guys would have got the dinner?

W I can't remember.

D In the evening, in the morning?

W No, it could be around--

D What's the earliest it could have been?

W Around 10:30, 11:00.

D What's the latest that it could have been in your opinion?

W 2:00 o'clock.

D And what's her demeanor like? What was Nicole's demeanor on that day?

W She was still drinking; she was constantly drinking and very upset.

D You guys get a table to yourself?

[Page 36]
W Uh-huh.

D And what did she say to you then, would interest us?

W Then I don't remember what happened. In that when we went to the--I don't know if she mentioned anything then or she mentioned when we were walking.

D Okay. At some point she mentioned that evening something that was significant to you?

W Uh-huh.

D That would interest us?

W Uh-huh.

D And what was that?

W Okay. I gotta remember exactly what she said.

D Please, please, take your time. Remember out of fairness to everybody it's important that you be accurate.

W Yes. I remember her telling me, where and when I don't remember exactly, but I remember her telling me that he wasn't dead when they got there.

D Okay. He meaning--

W Don. And they kept--she said they kept pouring vodka into his mouth and his nose. You gotta understand, she hammered me with those things. She wanted to talk to somebody and she hammered me with the same thing over and over and over and I'm like--

D She said that Don wasn't dead when we got home, is that correct?

W That's correct.

D When we're talking Nicole is telling you this personally, right?

W Uh-huh.

D And what does she say then?

W She said that they kept pouring vodka into his mouth.

D Did she use the term we, we kept--

W Yes.

[Page 37]
D Or I?

W They took turns, she said they took turns and--

D When you say they took turns, is Nicole one of those participants?

W Nicole and Billie are the two participants.

D Okay. And that's what I had to clarify.

W That's Nicole saying.

D Nicole and Billie took turns?

W Into pouring.

D Was he inebriated when they got home? Did she say he was drunk or had been drinking?

W Yeah, he was laying down on the floor.

D So he was on the floor already?

W Uh-huh. She went to pick 'em up, she said she walked in, I went to pick 'em up, but then something happened and I don't understand exactly what happened, how did they come about to get the idea to pour vodka into his mouth and nose, I don't know how this idea and who mentioned and how it happened. But she told me that her aunt told her that if he wake up the next day, he's gonna remember all that, all that meaning--

D That they were attempting to pour. When you indicated Nicole and Billie took turns pouring, did they say what kind of alcohol?

W Vodka, in his mouth and his nose.

D Did they indicate anything else that they would do? On the phone I thought--

W Yes. They put--she put his, she said that she put hand on his nose.

D Who put hand on nose?

W Both of them took turns. What she said exactly that her aunt put her hand on his nose and she put his hand on his mouth and every time he wanted to take a breathe she would let go, Nicole would let go. But then the Aunt brought the pillow and put it on his face.

[Page 38]
D So she tells you, Nicole specifically tells you that they would take turns pouring vodka down Don's nose and mouth?

W And mouth.

D And specifically, apparently you do, and correct me if I'm wrong, you remember that Nicole told you that the aunt would--

W Close his nose.

D --close his nose and Nicole would put her--

W Put her hand on--

D Over the mouth.

W Over the mouth. But she was--every time he wanted to take a breathe, wanted to breathe, she would let her hand go.

D What was--Did you get any impression or did she say why they did this with the nose and the mouth?

W She did not tell me.

D Did you form any opinion as to why they may have been doing that?

W I'm so thinking about how could somebody do that, I couldn't form no opinion or nothing. I'm just cannot believe what she's telling me, I'm still in a shock of what she's saying.

D And then at some point somebody gets a pillow?

W She said that her aunt get the pillow, not somebody, her aunt, she specified that her aunt get the pillow.

D Did she describe the pillow?

W She said one of the pillows in the living room--

D Did she say living room pillow as compared to a bedroom pillow?

W Yes, uh-huh.

D Okay. So aunt gets a pillow from the living room. Didn't describe it any further.

[Page 39]
W She did not say exactly from the living room. She said and then my aunt gets pillow and put it over his head.

D I guess that's where we have-to be accurate. You formed an opinion like a living room pillow, but could it have been a bedroom pillow?

W Could be.

D And that's what's important.

W Because if it was kitchen area, why did I inform the pillow would be from the living room because if you are in the kitchen area it's very close.

D But you're not sure, they didn't say living room or family room pillow, support a conclusion that it probably was from the living room or family room, but when asked directly could it have been a pillow from the bed--

W I don't know.

D Aunt gets a pillow Nicole tells you and what does aunt do with the pillow?

W She puts it on his face she said.

D On his face meaning--

W Don's face.

D And did Nicole tell you what the aunt did with the pillow?

W Yeah, she said she was thinking about why wasting all that good vodka on him and then she told the bottles and the pillow and throw 'em on the freeway by the casino.

D I'm sorry, I got you confused there at that point. Nicole says the aunt puts the pillow on Don's face. Any other details about what's happening then? Did she-- Did you ask for what purpose, what she did with the pillow, she held the pillow down, didn't hold it down, what did she say?

W You know, I did not ask if the guy gave his last breath, how did this happen. I'm telling you, I did not ask no questions. She was doing all the talking, I'm just listening.

D Did Nicole tell you what she was doing when the aunt placed the pillow on Don's face?

[Page 40]
W She was telling me that Don was playing with her boobs when this was happening.

D When the pillow was on his face?

W No, when they were pouring vodka and--

D Then we're backing up now.

W I can't even remember if when the pillow was on his face or when they're pouring the vodka, but at one point he was playing with her boobs, that's what she said.

D In that evening. You don't know what point--

W No, he was laying on the floor.

D But you don't know if it's before the pillow was placed on his--

W Yes, I don't know that.

D Okay. Any other details about the pillow, did she give any other details?

W No.

D Now, again, what she was doing when the pillow was on his face, she didn't say?

W No.

D Okay. Did she describe how the aunt put the pillow there, if she held the pillow, didn't hold the pillow, if she just placed it there?

W No.

D Okay. At any point in time did Nicole tell you what they did with Don? On the phone, we had a brief phone conversation--

W She mentioned that we killed him.

D We killed him?

W Meaning her and her aunt.

D We to you meaning--

W It wasn't the same night though, this is later on.

D Okay, I'm sorry.

W That wasn't the same night that she admitted of killing that person.

[Page 41]
D Okay. Why don't we jump then ahead to that specific conversation. At some point in time Nicole tells you they did what to Don?

W That they killed him.

D Is that what she said, we killed him?

W I don't remember exactly when, we were sitting on the in the parking lot in the casino. Her aunt was still playing inside and me and her were sitting in her aunt's car and she told me that.

D Okay. And approximately when was that that she told you that in relation--

W Probably 3:00 o'clock in the morning. Oh, the days?

D Approximately how long after--

W A week.

D Approximately a week.

W Yeah, either six days or seven days because she told me it's already been a week from his death.

D So she said that, a week?

W Uh-huh. So that's why I remember. And she was saying that she can't believe how could she do that, she doesn't hurt a fly.

D When she said we killed him, did she elaborate on that at all or leave it just--

W No, she left it just like that.

D And then she says I don't believe I could do that?

W Yeah, she says I can't believe I did that, I don't hurt fly, if there is a fly in the house or whatever she would put it in a box and take it outside and--

D That's what she told you?

W Uh-huh. And I felt sorry for her because-- And then what I suggest to her, I told her, I think your aunt used you. And I think the whole purpose for you coming over here is all planned from your aunt.

{Oakland County Circuit Court
Case No. 01-177745-FC}

Audiotape of 09/01/00 Conversation

DC = Danny Chahine
NT = Nicole Titlow

* * *

[Page 11]
DC: Damn. So you got nothing to worry about.

NT: And they told him that it's over. That they don't...the body's cremated.

DC: Yeah, so, it's over. Well, I just...

NT: But somebody like you comes along and tries to blackmail her.

DC: No, I'm not, I'm not gonna blackmail nobody. I don't wanna blackmail nobody. I'm minding my own business. I want to go to dinner and have fun.

NT: You can't prove it.

DC: I, I didn't...

NT: There's an opportunity there. I'm just kidding. I just want you to know I would never, ever, ever hurt anybody. I don't know what in the fuck happened. I don't even really remember exactly what happened. I was so drunk.

DC: You do. I told you. I told you.

NT: I know she got a pillow over his face. I do remember that.

DC: Mmm hmm.

NT: She's the one that poured the Vodka in his mouth. She did most everything and she even told me, she said, "I did all the work".

DC: She did all the work. I know she did all the work because...

NT: 'Cause I couldn't do it. Just couldn't

DC: ...because you were so drunk I think.

NT: Well, no, I kept letting go, I couldn't do it.

DC: Oh, you did, couldn't let him drink.

NT: I couldn't do it (unintelligible). I'd have to let go (unintelligible). And I poured just a little bit of Vodka down his throat and she says, "Oh, hell!" and just poured it up his nose. But it's sad and it's over.

DC: Please. Please, I don't wanna hear about this stuff because...

[Page 12]
NT: (unintelligible).

DC: I know, I know, I know, you know, I mean it's just, it's...

NT: You're never mean to me.

DC: It's, it's, uh...

NT: You're the only person I can talk to about it.

DC: I know but it's just, it makes me feel sad that what happened, all that, you know...

NT: You?

DC: I know, I know.

NT: It makes you feel sad?! Oh my god! It wasn't like he was alive. He...

DC: What?

NT: I mean, he went, he did fall out on the floor by himself. He was laying there.

DC: When you, when you walked in he was down in the floor?

NT: Oh, when we were there I, we were sitt'in in the living room and he got up out of the kitchen and he just went (ploop).

DC: He was passed out.

NT: Oh, he fell out, yeah.

DC: He fell out?

NT: I mean, basically, he could've really actually had a heart attack. They said he had a heart attack.

DC: Mmm hmm.

NT: So he may have. I mean awful, I mean...terrible.

DC: Oh, god.

NT: But I'm gonna, I'm gonna see a, I'm gonna see a therapist tomorrow.

[Page 13]
DC: Huh?

NT: I'm gonna go see a therapist.

DC: You need to go to therapist.

NT: I want to go.

DC: Both of you. You and Billie.

NT: She won't go there.

DC: She won't? She's losing her mind and I think it's all because of what she did. She's losing it.

NT: Well she kind of acts like it doesn't bother her but, you know, it's got to bother anybody.

DC: I don't care how strong she is.

NT: I mean at least, I mean, I don't have an excuse for what I did but I was so fucking drunk that I don't even remember, I started drinking that morning and sure I drank all day, I don't even really ought to remember.

DC: I know. I know you were drunk.

NT: She was sober.

DC: And I think she used you. I think she used you big time. I think the whole purpose of you coming over here...

NT: She was like that, she was like, do you think she's going crazy like with the jewelry store?

DC: Mmm hmm. She was like that.

NT: She seemed like she was a little flaky?

DC: Flaky, yeah.

NT: Okay, oh, she was, like, (unintelligible).

DC: Oh, she's, oh, she's, I know. She (unintelligible).

NT: She's always been like that unless she's at the casino and I hear she ain't like that at the casino.

[Page 14]
DC: Oh, man.

NT: She wakes right up. She's always, she's sick, too.

DC: She's mentally sick. This poor woman. I feel sorry for her. You know, she needs to go...

NT: She could be mentally sick because...

DC: And, you know, what she's done...

NT: ...her livers real bad.

DC: Yeah, well, you know, what she's done is done

NT: I've done it, too, though, Danny.

DC: It's not nor, not normal.

NT: But I've done it, too.

DC: (unintelligible).

NT: You have to realize that. So I'm not normal either.

DC: You're not normal either but you're not gonna kill me, are you?

NT: Yes. I think I'll do it tonight.

DC: No, don't say that, please.

NT: Oh, fuck no.

DC: I know.

NT: I felt so bad about what happened I can't, I think about it twenty-four hours a day seven days a week. If I feel one little bit of happiness I feel guilty for killing him 'cause I don't feel like I deserve it. If I got struck down by lightening right now I deserve anything I get.

DC: I hear you. I hear you. I hear you! I hear you! I mean I'm, I'm an outsider.

[Page 15]
NT: But I cannot go the rest of my life. I have asked God to forgive me and I've prayed every night and I know what I did is wrong. And I'm, like, "Whatever you feel is right, God, do it. I mean, whatever you need."

DC: Oh, my god.

NT: Well, with everything that's went on in my life I can't see much more bad happening anyway.

DC: I mean I'm, I'm an outsider.

NT: But in a way it comes back to me as if, I mean, I've prayed and prayed for my life to get together. How can I (unintelligible) before this I used to pray constantly, all the time, "Please show me a way out of this. Show me a way so I can have my surgery and have a normal life." and I asked God and so maybe he was getting ready to take Don anyway and this is the, he gave me an opportunity to get my life together. I don't know. But that's what I, kind of comes to me. Because everything is falling in place for me. I mean my, I met this girl. She wants me to do the beauty salon thing with me. I mean just, bad things should be happening to me. Not good things. But I have asked for forgiveness and, I mean, I mean I think he knows that I'm, that I'm a good person and he knows. I mean, I really deep down think, I think he knows that what happened to me was that I was a victim. I really think I was a victim. I really do. Everything that was going on, I mean, she knew how bad I wanted my surgery. She knew how fucked up I was about telling you my situation. She knew how fucked up I was about, just crazy. You know, I mean I was just crazy. I mean she could've stopped it. She could've just said "no".

DC: Mmm hmm.

NT: Something like, you know. 'Cause at first I was playing. I was just really playing. I thought it was funny. You know, just being silly, whatever.

DC: Mmm hmm.

NT: Then she says, "I'll give you money", or whatever. And I, I honestly to God just thought it was a big old joke at first. And then she got real serious and then after she really got into it seriously and then she was

like, "Well we can't stop now. He'll know we were killing him." Okay. But you just have got to not, I mean you've got to understand if we're gonna be friends or whatever that this is not something I, I'm not that type of person. I mean I'm not.

DC: I know you're not. I know you're not. I know you're not, but that's why...

[Page 16]
NT: That's something I would never in my, in a million years ...

DC: That's why I'm so sad.

NT: I mean...

DC: I mean...

NT: ...I would never even, I mean I have, my little brother tries to throw a cat over the fence and the dog got a hold of it and I had to, cried for two, for two days and I ran it to the vet and I couldn't even hurt nothing. And believe it or not I've went to a lot of those meetings, AA meetings...

DC: Yeah.

NT: ...and they talk about...

DC: Stuff like that?

NT: ...those alcoholics where they drink and drink and drink and it progresses. It's a disease. It progresses to the point where you get, when you drink it makes you really crazy and you get up in the morning, I had been on this drunk for two weeks straight. I was drinking

every night for two weeks and sometimes all day. I'd get up the next day and start drinking. I only started doing that 'cause I was just blitzed. I don't know why. But, um, you can't do that and be sane.

DC: No.

NT: Nobody can.

DC: Nobody. No.

NT: Then I hadn't had a hormone shot for almost a month.

DC: Mmm hmm.

NT: That was making me just loony as hell right there.

DC: Mmm hmm.

NT: You can't do that. I'm not supposed to do that. They tell you, "Do not get off those hormones like that. They will make you snap." And then her telling me about all of the money and what we could do with the money and, but it's over and it's done with and I really don't think that...

[Page 17]
DC: It was a mercy killing, like you said.

NT: (unintelligible).

DC: I don't know.

NT: Oh, yes, he was. I mean, I mean I'm not trying to make excuses for it.

DC: He was, I know. I, I...

NT: He was, actually, I think that Don was ready to go.

DC: Yeah, he was.

NT: And I told her the same thing.

DC: So what...

NT: I told the Detective Bureau ...

DC: So what the heck...

NT: I told the Detective Bureau about it...

DC: What the heck is going on? Why you guys, why you guys, he was ready to go, why you did not let him go naturally? You know what I'm saying? That's why I'm pissed off with the greed! You, you guys, you, she was greedy.

NT: Why did I not let him go naturally?

DC: That, you, your, his wife.

NT: 'Cause I didn't even realize what the fuck I was doing.

DC: He was seventy-five years old. And you had to do that to him? (Unintelligible).

NT: Well she may have been...

DC: (Unintelligible).

NT: She may have been tired of cleaning up blood every time he fell down. She may have been tired of

him trying to grab everybody's, my ass every time he turned around, or my tits, which he was. She may have been tired

[Page 18]
of him drinking to the point of where they couldn't go on vacation or anything...

DC: She lived with him for sixteen years.

NT :...and him drinking...She put up with it.

DC: All she had to do was prob'ly two months before he would have gone naturally. He, the guy, you said the guy was gonna die, almost gonna die. She had to do it. Prob'ly if she had waited...

NT: I don't know.

DC: You know what I'm saying?

NT: I don't know.

DC: That's, that's, that's what's driving me crazy! You had to...

NT: Why's it driving you crazy?

DC: Because, you had to kill an old person. An old person! He's dying! Why would you kill somebody that's dying? You see, you, look what you're doing to yourself and look what she's doing to herself. The guy was dying!

NT: I don't need this from you right now.

DC: I don't want to say that but you keep, you keep, you keep bringing this up and I'm so upset! I'm so upset that seeing you sad and upset. You know what I'm saying? You need to go to a psychiatrist. You're telling me that you need to go psychiatrist because of that.

NT: Why did we have to do that? I, if I knew that I could probably figure it out and tell you why. I don't know why. I was not even thinking about no money at that time. I wasn't thinking period at that time.

DC: I know! And that's why I'm so upset for you and for her and for him.

NT: And I think she's, Billie's a little crazy before that. Her, her...

DC: She is crazy.

NT: ... liver is failed. I mean she's, like, they told, said that she'd be a little nutty. And...

DC: I don't know.

[Page 19]
NT: I don't know. Well, I mean, you didn't see him. He was, he was, he was mean.

DC: I don't know about that, I don't know the guy.

NT: I mean he was, he didn't, like...

DC: I'm just saying, you know. Mmm hmm.

NT: I don't know.

DC: Let's find the restaurant, please. Um, I need a drink. I'm ready to collapse. I need a drink.

NT: Well you needn't start, start on me.

DC: Yeah, I'm not starting on you but it's just I'm telling you, I'm being honest with you. That's how I feel.

NT: I don't know why! It was not the money. I didn't even think I was gonna get no hundred thousand dollars. I thought she was gonna give me, I mean, I started, was like joking. You think I'd kill somebody for twenty-five thousand dollars. Fuck no! Twenty-five thousand dollars can't even buy you a car.

DC: I know.

NT: I can make that in a month...

DC: I know.

NT: ...escorting if I really wanted the money.

DC: Right.

NT: I don't really, I didn't care about that money. I don't even want that car. I haven't hardly spent a dime. I bought a couple outfits.

DC: (unintelligible).

NT: I feel guilty for even spending the money. I thought about just giving it to charity or something. And then I thought, well that's really stupid. I don't know. But now you are gonna have to be a little stronger than this.

DC: I am...

[Page 20]
NT: I need to be around you for support. You're gonna have to be (unintelligible) start having a nervous breakdown.

DC: I'll be supporting you. I'm just. ..

NT: I'm sure you've seen it happen in your country every day.

DC: I've seen it happen in my country every day and that's why I'm upset because it's all over. Everywhere you go there's people...

NT: Well, you have to die. You know, ...

DC: Well, I know you have to die.

NT: ...sooner or later we're gonna all have to die. It is in our, I mean, it's not un (unintelligible) to kill I guess or whatever but I just feel like I was at the wrong place at the wrong time and I was drinking when I shouldn't have been. I mean, I was just, so much drinking to make up for the drugs. You know? I know for a fact that I was not in my, my, that's, like right now, you couldn't not give me a hundred million dollars to hurt somebody. Not even to hurt somebody. That hitman I know offered me one time twenty-five thousand dollars just to take and just hit this woman, the girl in the ribs with a bat and break her ribs because she snitched on drug dealers.

DC: Uh huh. What guy? The guy in Denver?

NT: She shoulda had her, uh, ass kicked.

DC: The guy in Denver or something?

NT: She actually should've been...

DC: Do you...

NT: She shouldn't be (unintelligible).

DC: Let me, let me ask you where we are, you know, because I'm...

NT: But I said, "No." I was like, "Jordan, she's never done anything to you." And Don had never done anything to me either.

DC: Yep.

STATE OF MICHIGAN
IN THE SIXTH JUDICIAL CIRCUIT COURT
(OAKLAND COUNTY)

01-177745-FC

THE PEOPLE OF THE STATE OF MICHIGAN

Oakland County
Judge Wendy L. Potts
People V Titlow, Vonle

v

Case No. 01-177745, 6 FC

NICOLE VONLEE TITLOW,
BILLIE JEAN ROGERS,
Defendants.
_____/

MOTION PROCEEDINGS
TAKEN BY VIDEO TAPE RECORDING
BEFORE THE HONORABLE WENDY POTTS,
CIRCUIT COURT JUDGE
Pontiac, Michigan - Wednesday, August 1, 2001

APPEARANCES:

For the People: MR. JOHN SKRZYNSKI (P33013)
1200 N. Telegraph Road
Pontiac, MI 48341
(248) 858-0656

For Defendant Titlow: MR. RICHARD LUSTIG (P16868)
240 Daines Street
Birmingham, MI 48009
(248) 258-1600

For Defendant
Rogers:

MR. WALTER PISZCZATOWSKI
(P27158)
1760 S. Telegraph Road
Suite 300
Bloomfield Hills, MI 48302
(248) 335-5000

Fara Duffey
CER 0904
Livingston-Oakland Court Reporting
(810) 229-9487

* * *

[Page 21]
{Mr. Piszczatowski, for Defendant Rogers}
going-that's raised in this case and that's because in Beasley there was no non self-inculpatory statements. And in this case, your Honor, the statements of Ms. Titlow are largely exculpatory and largely in fact wholly exculpatory with respect to her participation in the murder, wholly exculpatory with her participation in any suffocation, wholly exculpatory with respect to anything that was done with any of the evidence after the event and in fact wholly exculpatory with respect to the fact that she was still intoxicated, she couldn't even remember really what had gone on and again that goes to the reliability of the statement going back to that just for a second, if I could pause to add that under the reliability issue. So Ms. Titlow basically admits to one thing in her statement and that is at some point during the event they came home and he was on the ground and-he being the deceased--was on the ground and the fact that she poured some alcohol down his throat or held his nose at one point. And then she says, but I

couldn't hold his mouth shut to keep him from breathing, I had to let him go. And she tells that to Chaheen and Chaheen basically says that she said she couldn't do that because she couldn't hurt a fly or she couldn't hurt the man or something to that

[Page 22]
effect. So what you have is a very exculpatory-there's an admission, if you will, as to Titlow that she did pour some alcohol down the throat, that she did participate in that initially but the rest of the statement, the entire statement following that is a non-inculpatory statement. Everything subsequent to that is non-inculpatory unlike Beasley where the statement is clearly inculpatory all the way through and in Poole the statement is inculpatory all the way through because he admits to actually pulling the trigger, shooting one guy, Poole shooting the guy in the head and then in Beasley the same thing.

THE COURT: I thought in Poole it was both.

MR. PISZCZATOWSKI: You mean-in Poole, Judge?

THE COURT: And that the court said when it's mixed you can use the whole statement. Let me see if I've got the right case.

MR. PISZCZATOWSKI: I'll pull it up, too, Judge. I have that here.

THE COURT: Where there's a narrative.

MR. PISZCZATOWSKI: Where there's a narrative, Judge. That may be true if the narrative is an

inculpatory narrative and that's, you know, the difference.

THE COURT: No, no. It says as a whole if the

**{Michigan Court of Appeals
No. 241285}**

TROY POLICE DEPARTMENT
Charles T. Craft, Chief of Police 500 W. Big Beaver,
Troy, Michigan 48084 (248) 524-3443

October 25, 2001

PRIVILEGED AND CONFIDENTIAL

Det/Sgt. Donald Zimmerman
500 West Big Beaver Road
Troy, Michigan 48098

Re: VONLEE NICOLE TITLOW
Org. Date: 08-12-00
Camp. # 00-29569
Polygraph # TPD-020-01

POLYGRAPH EXAMINATION REPORT

HISTORY
Officers are investigating the death of Donald Rogers. He was found by his wife Billie Rogers, lying on the kitchen floor. His blood alcohol content was 0.44, and was thought to be the cause of his death. Investigators found out that he was murdered by his wife and her nephew, Vonlee Titlow. Titlow is being tested. He is charged in the murder, and is represented by counsel, here today, in Mr. Richard Lustig. Titlow made an official statement to the Prosecutor's Office and is willing to be tested on its veracity.

EXAMINATION DATE

A polygraph examination was scheduled for VONLEE NICOLE TITLOW in the polygraph suite of the John F. Nichols Law Enforcement Complex at 6:00 PM, 10-25-01.

REVIEW MATERIAL

Provided to this examiner for review prior to THE examination was Troy Police Department investigative report # 00-29569

POLYGRAPH RIGHTS

VONLEE NICOLE TITLOW was informed of his constitutional rights and his rights according to Act 295, P. A. 1972. The waiver of rights and permission forms were reviewed and signed.

PRETEST INTERVIEW

Titlow said that Rogers had been drinking and passed out on the floor. Without a prior plan Titlow and Mrs. Billie Rogers poured Vodka down Rogers' throat and then Mrs. Rogers suffocated him with a pillow. Mrs. Rogers and Titlow then went to the casino. When they returned from the casino later, they called 911 and reported finding him dead. Titlow denied killing Donald Rogers personally. Titlow denied that he planned the death. Titlow denied lying in his statement to the prosecutor. All test questions were formulated and reviewed with VONLEE NICOLE TITLOW. He acknowledged that he understood them.

INSTRUMENT

During the polygraph examination a Lafayette Factfinder polygraph instrument, Model #761-69GA, containing electrically enhanced components, was used. The control question technique was utilized.

RELEVANT TEST QUESTIONS

1. (Q) Are you lying about what happened that night with Don?
   (A) No.

2. (Q) Did you plan with Billie to kill Don when he was drunk?
   (A) No.

3. (Q) Are you lying that Billie is the one that smothered him with that pillow?
   (A) No.

4. (Q) Did you personally smother Don with that pillow?
   (A) No.

5. (Q) Are you lying that you left when Billie smothered him?
   (A) No.

OPINION

It is the opinion of the undersigned examiner, based on the analysis of the polygraph examination of VONLEE NICOLE TITLOW, that he is being truthful to the pertinent test questions.

Respectfully submitted
Christopher J. Lanfear
Christopher J. Lanfear
Polygraph Examiner
Troy Police Department
CJL/ml

Act 295, P.A. of 1972 (MCL 338.1728)
Any recipient of information, reports or results from a polygraph examiner. except for the person tested, shall not provide, disclose or convey such information, report or results to a third party, except us may be required by law and the rules promulgated by State Board of Forensic Polygraph Examiner.

STATE OF MICHIGAN
SIXTH JUDICIAL CIRCUIT COURT
(OAKLAND COUNTY)

01-177745-FC

THE PEOPLE OF THE STATE OF MICHIGAN

Oakland County
Judge Wendy L. Potts
People V Titlow, Vonle

v

Case No. 01-177745 FC

VONLEE NICOLE TITLOW,
Defendant.
_____/

PLEA PROCEEDINGS
TAKEN BY VIDEO TAPE RECORDING
BEFORE THE HONORABLE WENDY POTTS,
CIRCUIT JUDGE
Pontiac, Michigan - Monday, October 29, 2001

APPEARANCES:

For the Plaintiff: JOHN M. SKRZYNSKI (P33013)
1200 North Telegraph Road, PA
Pontiac, Michigan 48341
(810) 858-0656

For the Defendant: RICHARD M. LUSTIG (P16868)
240 Daines Street
Birmingham, Michigan 48009
(248) 258-1600

Fara Duffey
Livingston/Oakland Court Reporting
(810) 229-9487

* * *

[Page 4]
(at 15:03:49 - court reconvenes)

COURT CLERK: Your Honor, calling case number 2001-177745 FC, People of the State of Michigan v VonLee Titlow.

MR. SKRZYNSKI: Good afternoon, your Honor. My name is John Skrzynski and I'm appearing for the Prosecutor.

MR. LUSTIG: Richard Lustig on behalf of the defendant.

MR. SKRZYNSKI: Your Honor, this is the case wherein the defendant, who is present in the courtroom today with her attorney, is charged with one count of first degree premeditated murder and at this time, the People and the defendant have entered into a plea bargain and a sentencing agreement.

The agreement and bargain is as follows that the People, at this time, would move to add count II, manslaughter and defendant would agree to plead guilty to that count under these conditions. First of all, that the defendant would agree to testify and would actually testify against the co-defendant in this matter, Billie Rogers, during the course of her trial in accordance with a statement that she proffered to the Troy Police and myself at the Sheriff's Department last week and upon which, she

[Page 5]
passed a polygraph administered by the Sheriff's Department. Secondly, that defendant would agree to--

and if there would be a Cobbs agreement on sentencing in this matter, that the sentence would be a minimum of seven years to a maximum of 15 years. And finally, that the defendant would agree and waive any kind of right to appeal on either the plea or the sentence. Those are the conditions of the plea. We'd ask that the defendant, once she has plead, that she be sentenced--the sentencing be put over until after her testimony in the trial of Billie Rogers.

Furthermore, Judge, the People would reserve the right, in the event the conditions that I set forth, are not met by defendant--the People would reserve the right to withdraw the offer of manslaughter and would resume the prosecution of this case on a count of first degree murder and proceed to trial at that time. That's the agreement.

MR. LUSTIG: Your Honor, my I question the defendant before we go ahead?

THE COURT: Sure.

MR. LUSTIG: All right. VonLee, as you are aware, we're here today for a trial and the Judge has a jury available, if not today, then tomorrow or Thursday. You understand that?

THE DEFENDANT: Yes.

[Page 6]

MR. LUSTIG: Okay. You and I have gone over all of the evidence together over a long period of time, correct?

THE DEFENDANT: Correct.

MR. LUSTIG: And you and I have discussed the fact that there are certain facts that could get you convicted of first degree murder. Do you understand that?

THE DEFENDANT: Yes.

MR. LUSTIG: All right. They include two things. Number one, that you had a--you received $100,000.00 after the death of your uncle, correct?

THE DEFENDANT: Correct.

MR. LUSTIG: And also, that during the course of the so-called homicide, you did feed alcohol into his system and you heard the medical examiner's testify as to the affect that might have had. You understand that?

THE DEFENDANT: Yes.

MR. LUSTIG: Okay. Now, although you didn't participate in what appears to be a smothering, you understand a jury could find you guilty of first degree murder, second degree murder, manslaughter or nothing at all. You understand that?

THE DEFENDANT: Yes.

MR. LUSTIG: When you plead guilty like this, you

[Page 7]
give it all up.

THE DEFENDANT: I understand.

MR. LUSTIG: The only thing that remains is for the Judge--for you to testify and if you testify and the Judge accepts this plea, then the Judge will give you a seven to 15 year sentence and that there will be no appeal or anything like that. Do you understand that?

THE DEFENDANT: Yes.

MR. LUSTIG: And now finally, there's no--regardless of the fact that I haven't been paid for a trial, I will proceed tot trial without any further funds. Do you understand that?

THE DEFENDANT: Yes.

MR. LUSTIG: Okay. And it's not my intent here to abandon you at this particular time.

THE DEFENDANT: Yes.

MR. LUSTIG: Okay. Now, the Judge is going to question you and you filled out a form that you signed?

THE DEFENDANT: Yes.

MR. LUSTIG: Okay. And you agree and you understand that form because we talked about it yesterday.

THE DEFENDANT: Yes.

MR. LUSTIG: Okay. She's ready for your voir dire, your Honor.

[Page 8]

THE COURT: What are the max--what is the maximum sentence on the manslaughter?

MR. SKRZYNSKI: Fifteen years.

THE COURT: All right. If you'll raise your hand, please--your right hand to be sworn.

COURT CLERK: Do you solemnly swear or affirm the testimony you're about to offer is the truth, the whole truth and nothing but the truth?

THE DEFENDANT: I do.

THE COURT: You can put your hand down but please keep your voice up.

THE DEFENDANT: Okay.

THE COURT: What is your name?

THE DEFENDANT: VonLee Nicole Titlow.

THE COURT: How old are you?

THE DEFENDANT: I am 34.

THE COURT: Can you read, write and understand the English language?

THE DEFENDANT: Yes, your Honor.

THE COURT: Can you hear and understand me?

THE DEFENDANT: Yes.

THE COURT: Could you hear and understand. Mr. Lustig?

THE DEFENDANT: Yes.

[Page 9]

THE COURT: Are you satisfied with his advice?

THE DEFENDANT: Yes, I am, your Honor.

THE COURT: Do you understand that you are pleading guilty to manslaughter with a maximum penalty of 15 years?

THE DEFENDANT: Yes, ma'am.

THE COURT: Pursuant to the Cobbs agreement regarding sentencing, do you understand your sentence will be a minimum of seven years and a maximum of 15 years?

THE DEFENDANT: Yes, your Honor.

THE COURT: Other than what's been stated on the record, are you aware of any other plea bargain or any other inducement to get you to plead here today?

THE DEFENDANT: No, your Honor.

THE COURT: Do you understand you have a right to have your own lawyer represent you from start to finish, including trial, sentence and application for appeal and the Judge--I would appoint a lawyer for you if you could not afford a lawyer of your choice?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand you have a right to a trial by a jury or by a judge without a jury if the Prosecutor and I agree?

THE DEFENDANT: Yes, ma'am.

[Page 10]

THE COURT: Do you understand throughout the trial, you are presumed innocent until the Prosecutor proves your guilt beyond a reasonable doubt?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand you have a right to have all the witnesses against you appear at trial, to have your lawyer ask those witnesses questions and I would order any witnesses you might have to appear at your trial?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand you don't have to testify at trial; no one can say anything about your not testifying or hold it against you or you could testify if you wanted to?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand if I accept your guilty plea right now, you will not have a trial of any kind?

THE DEFENDANT: Yes, ma'am.

THE COURT: You will be giving up the rights I just told you about and you won't be able to come back and claim that this plea today was a result of some promises or threats that you didn't tell me about and that it wasn't your choice to plead guilty?

THE DEFENDANT: Yes, ma'am.

[Page 11]

THE COURT: Do you understand you will not be appealing this matter pursuant to this agreement? You don't have any appellate rights.

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand that a plea of guilty will mean you have a conviction?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand if you're on probation or parole, this plea could affect your probation or parole status?

THE DEFENDANT: Yes.

THE COURT: You're not on probation or parole, are you?

THE DEFENDANT: No.

THE COURT: You understand if you went to trial, you would have an appeal as a right?

THE DEFENDANT: Yes, your Honor.

THE COURT: Has anyone threatened you to get you to plead guilty?

THE DEFENDANT: No, your Honor.

THE COURT: Is it your own choice to plead guilty?

THE DEFENDANT: Yes.

THE COURT: In what city did this offense occur?

THE DEFENDANT: In Troy.

[Page 12]

THE COURT: Tell me what occurred that makes you think that you're guilty of manslaughter on August 12th of 2000. What did you do that makes you think you're guilty of manslaughter?

THE DEFENDANT: I did perform an act in a reckless and dangerous manner which put the victim in a position of great bodily harm and/or death.

MR. LUSTIG: And what did you do? What was the act that you performed?

THE DEFENDANT: What I did, personally, was pour a shot of vodka in his mouth and I did accept money afterwards not to say anything about what had happened.

THE COURT: Okay. Who was with you at the time?

THE DEFENDANT: My aunt Billie Rogers.

THE COURT: Who was--what was the name of the victim?

THE DEFENDANT: Donald Rogers.

THE COURT: Do you have any further questions?

MR. SKRZYNSKI: Can I ask ...

THE COURT: Yes.

MR. SKRZYNSKI: In pouring the alcohol down Mr. Rogers throat, you were aiding Billie Rogers, who was also doing that. Is that correct?

THE DEFENDANT: She was, your Honor.

[Page 13]

MR. SKRZYNSKI: And that eventually, Billie Rogers took a pillow and smothered Donald Rogers and killed him by doing that. Is that correct?

THE DEFENDANT: Yes, your Honor.

MR. SKRZYNSKI: And this whole thing--the pouring of the alcohol, that was part of the--of all the acts that eventually led to the smothering. That was all within a very short period of time, just a few minutes?

THE DEFENDANT: Yes, your Honor.

MR. SKRZYNSKI: Okay.

THE COURT: Do you have anything further that you want to ask?

MR. LUSTIG: No, your Honor.

THE COURT: Are the People satisfied?

MR. SKRZYNSKI: I would just like to ask one question, if I may. That you understand that no matter what the sentencing guidelines are on this case, that you're agreeing to a sentence of seven to 15 ...

THE DEFENDANT: Yes.

MR. SKRZYNSKI: ... and that you will not appeal that sentence?

THE DEFENDANT: Yeah, I understand.

MR. SKRZYNSKI: Okay. I have no other questions.

THE COURT: Are you satisfied with the plea...

[Page 14]
MR. SKRZYNSKI: Yes, I am.

THE COURT: ...and the factual basis. Are you aware of any other promises, threats or inducements?

MR. SKRZYNSKI: No, ma'am.

THE COURT: Mr. Lustig, are you satisfied?

MR. LUSTIG: She wants to know whether she'll get credit for time served all the way from Chicago or not. I believe she will.

MR. SKRZYNSKI: Whatever the...

THE COURT: Whatever...

MR. SKRZYNSKI: ...policy of the Department of Corrections are.

THE COURT: Yeah.

MR. SKRZYNSKI: She'll get everything she's entitled to.

THE COURT: You will.

THE DEFENDANT: Thank you.

THE COURT: Are you satisfied with the plea?

MR. LUSTIG: Yes, your Honor.

THE COURT: The Court is satisfied there is sufficient factual basis for the plea. I find that it's understanding, accurate and voluntary and I do accept the plea. The matter will be set for sentencing on December 19th at 1:30.

[Page 15]

MR. SKRZYNSKI: Your Honor, I'd just ask that if she's not had an opportunity to testify against the codefendant by that time, if we could move that sentencing date?

THE COURT: We will. We'll adjourn it but I would assume that the other trial will take place November ...

MR. SKRZYNSKI: Right. 29th.

THE COURT: ... 29th.

MR. SKRZYNSKI: A month from today. Thank you very much.

THE COURT: Thank you.

MR. LUSTIG: Can we just have one minute, please?

THE COURT: Yes.

COURT CLERK: All rise, please.

(at 15:13:47 - court recesses)- - -

STATE OF MICHIGAN
IN THE OAKLAND COUNTY CIRCUIT COURT

THE PEOPLE OF THE STATE OF MICHIGAN

CASE NO.: 01-177745-FC
01-177745-FC

VS.
VON LEE TITLOW /

Oakland County
Judge Wendy L. Potts
People V Titlow, Vonle

ORIGINAL CHARGE:
MURDER I
DEFENDANT OFFERS PLEA OF GUILTY TO THE CHARGE(S) OF: *MANSLAUGHTER*

DATE: *10/29/01*

PEOPLE'S EXHIBIT NO. 1*
[DEFENDANT SHALL BE PLACED UNDER OATH]

1. What is your name? *VON LEE TITLOW*

2. How old are you? *34*

3. [Can you read, write, and understand the English language? ✓ Can you hear and understand me? ✓ Could you hear and understand your attorney? ✓ Are you satisfied with the advice of your attorney? ✓

4. Do you understand that you are pleading guilty to (name of offense{s}) *MANSLAUGHTER*? _____

5. Do you know that the most time you can get is *15* years in jail/prison; (if applicable) and the shortest time you must do is *0* years? _____

6. Pursuant to **People vs. Cobbs,** have there been any statements about your sentence? *YES*

7. Is there a plea bargain? *YES - 7-15 -, TRUTHFUL TESTIMONY*

7a. [(If yes) Has the whole plea bargain been stated on the record?] *YES*

8. Do you understand you have a right to have your own lawyer represent you from start to finish, including trial, sentence, and an application for appeal, and the Judge will appoint a lawyer for you if you cannot afford a lawyer of your choice? ✓

9. Do you understand that you have a right to a trial by jury, or by a Judge without a jury, if the prosecutor and the Judge agree? *YES*

10. Do you understand that throughout the trial, you are presumed innocent until the prosecutor proves your guilt beyond a reasonable doubt? *YES*

11. Do you understand that you have a right to have all the witnesses against you appear at trial, to have your lawyer ask the witnesses questions, and to have a Judge order any witnesses you might have to appear at the trial? *YES*

12. Do you understand that you don't have to testify at trial and nobody can say anything about your not testifying or hold it against you? On the other hand, you have the right to testify at the trial if you want to testify? *YES*

13. Do you understand that if the Judge accepts your guilty plea, you will not have a trial of any kind, and you will be giving up all these rights I have told you about, and you will be giving up any claim that the plea was a result of promises and threats that were not disclosed to the court, and it was not your choice to plead guilty? *YES*

14. Do you understand that any appeal from the conviction and sentence following the guilty plea will be by application for leave to appeal and not by right? *I GIVE UP RIGHT TO APPEAL*

15. Do you understand that a plea of guilty means you have a conviction? *YES*

16. Do you understand that if you are on probation or parole, this plea could affect your probation or parole status? *NA*

17. Has anyone threatened you to get you to plead guilty? *NO*

18. Is it your own choice to plead guilty? *YES*

19. Where did this offense(s) occur? *TROY, MICH.*

State in your words what you did: ~~*I AIDED AND ABETTED BILLIE ROGERS IN THE DEATH OF DON ROGERS I*~~

I am telling the Court that my lawyer has read and explained all of the questions on this paper, and that my answers are true.

Von Lee Titlow
DEFENDANT'S SIGNATURE

R. Lustig
DEFENDANT'S ATTORNEY

21. Do both the prosecutor and defense attorney agree the court has complied with MCR 6.302(B)-(D)?.....

22. Is either the prosecutor or the defense attorney aware of any promises, threats, or inducements other than those already disclosed on the record? .....

[THE COURT MUST STATE ON THE RECORD THAT IT FINDS AN UNDERSTANDING, ACCURATE, AND VOLUNTARY PLEA.]
11-98 46465

{Michigan Court of Appeals
No. 241285}

RETAINER AGREEMENT

THE UNDERSIGNED, (hereinafter referred to as **Client**), hereby employs and retains the LAW FIRM OF HATCHETT, DEWALT & HATCHETT, 485 Orchard Lake Road, Pontiac, Michigan, 48341, (248) 334-1587, (hereinafter referred to as **Attorney**), to represent **Client** in the following matter(s), on the following terms and conditions:

IN CONSIDERATION of **Attorney** agreeing to represent **Client**:

(1) **Client** agrees to pay **Attorney** a MINIMUM FEE, exclusive of costs, of $ *$10,000* , which shall be payable as follows: see *#12 for trial fee*

RETAINER: $ *10,000*

BALANCE: $_____ BY:_____

(2) **Client** understands that no portion of the minimum fee is refundable at any time.

(3) **Attorneys of the Law Firm of Hatchett, DeWalt & Hatchett** will be responsible for the primary representation of **Client** in this case and for the supervision of this case. However, the **Law Firm of Hatchett, DeWalt & Hatchett** reserve the right to assign other lawyers in the law firm to represent **Client** in the event such representation becomes necessary or **Attorney** believes it is in the best interest of the **Client** to assign portions of their case.

(4) **Client** further agrees to reimburse **Attorney** for all Court Costs, transcript fees, depositions, long distance telephone charges, copying charges, fax transmission and receipt charges, traveling expenses, and other expenses, advanced by **Attorney** in connection to **Clients** case. **Client** understands and agrees that any and all costs incurred will be exclusive of the minimum fee retainer and will be paid upon receipt of an invoice for same or request payment of the cost by Client directly or in advance.

(5) **Client** agrees that **Attorney** has made no promises or guarantees regarding the outcome of **Client's** case.

(6) **Client** hereby binds **Client's** heirs, executors and legal representatives to the terms and conditions set forth herein.

(7) **Client** understands that **Attorney** will represent **Client** in the Trial Court only, and will not represent **Client** in an appeal, if any, without written Criminal Appeal Retainer Agreement entered into and signed by both **Attorney** and **Client**.

(8) In accordance with the Michigan Rules of Professional Conduct, it is the policy of this law firm to provide our clients with copies of all pleadings, correspondence, and other documents received by us or filed on **Client's** behalf pertaining to the matter(s) upon which we represent **Client**. All materials contained in **Client's** file(s) are considered to be protected information and shall remain strictly confidential. Such materials and/or their attorneys, agents and personnel without Client's express authorization.

(9) Upon the conclusion of our representation of **Client** with regard to this matter, **Client** may, at any time within six months, request in writing a copy of any portion or portions of **Client's** file, with which client has not previously been provided including original documents, if any, contained in **Client's** file.

(10) At any time after six months have elapsed since the conclusion of our representation of **Client**, we may in our discretion, dispose of **Client's** file through shredding or incineration. Pending their disposition, all closed **Client** files will be stored in a designated locked storage area upon the premises within the building where **Attorney** maintains its law offices, or such other location determined by the law firm.

(11) Further, unless otherwise stated herein, or unless a separate written retainer agreement is entered into, **Client** understands that **Attorney** will not represent **Client** on any probation violation(s) which may result from or be incidental to **Client's** sentence (if any) as imposed by the Trial Court.

(12) **Client** further agrees to allow **Frederick M. Toca, Jr., and the Law Firm of Hatchett, DeWalt & Hatchett** to sell her story and/or do any and all interviews, publicity, etc, related to this matter in order to help derive $100,000.00 (*80,0000*) which would serve as trial fee. These monies would also be used to hire any experts necessary, and for other necessary expenses related to trial.

(13) Additional Terms:

_____

_____

_____

I HAVE READ THIS AGREEMENT, HAVE RECEIVED AN EXECUTED COPY OF IT, AND AGREE TO THE TERMS AND CONDITIONS. THERE ARE NO OTHER AGREEMENTS, ORAL OR OTHERWISE, BETWEEN THE CLIENT(S) AND ATTORNEY.

Dated: _____ _____
Client

Dated: *11/26/01* *Vonlee N Titlow*
Client

LAW FIRM OF HATCHETT, DEWALT & HATCHETT

Dated: *11/26/01* *Frederick M. Toca, Jr.*
FREDERICK M. TOCA, JR.
ATTORNEY AT LAW

STATE OF MICHIGAN
SIXTH JUDICIAL CIRCUIT COURT
(OAKLAND COUNTY)

01-177745-FC

PEOPLE OF THE
STATE OF MICHIGAN,

Oakland County
Judge Wendy L. Potts
People V Titlow, Vonle

vs.

Case No. 01-177746-FC

VON LEE TITLOW
Defendant.
_____/

MOTION
TAKEN BY VIDEO TAPE RECORDING
BEFORE THE HONORABLE WENDY POTTS
CIRCUIT JUDGE
Pontiac, Michigan - Thursday, November 29th, 2001

APPEARANCES:

For the People: JOHN M. SKRZYNSKI (P33013)
1200 N. Telegraph Road
Pontiac, MI 48341
(810) 858-0656

For the Defendant: FREDERICK M. TOCA (P56608)
485 Orchard Lake Rd.
Pontiac, MI 48341
(248) 334-1587

Fara Duffey
CER 0904
Livingston-Oakland Court Reporting
(810) 229-9487

* * *

[Page 3]
Pontiac, Michigan

Thursday, November 29th, 2001

9:23 a.m.

COURT CLERK: Calling case number 2001-177745-FC, People of the State of Michigan versus Von Lee Titlow.

MR. SKRZYNSKI: Good morning, your Honor.

THE COURT: Good morning.

MR. SKRZYNSKI: My name is John Skrzynski. I'm here for the Prosecutor.

MR. TOCA: Good morning, your Honor. May it please this Honorable Court, Frederick M. Toca on behalf of Defendant.

MR. SKRZYNSKI: Your Honor, at this time, my understanding is that this Defendant who has previously tendered a conditional plea to the Court, wishes to withdraw that plea. The Prosecutor's office wishes to withdraw from any kind of agreement that was reached with this witness, on the basis that we had an agreement that the Defendant would be testifying in the trial of Billie Rogers. That she would plead guilty to manslaughter and that she would be sentenced from seven to fifteen. The Defendant has indicated through her attorney that she will not testify, except

[Page 4]
if her sentence can be three to fifteen, which is a violation of the agreement which we had entered. Therefore, we feel we are no longer bound by the agreement. We wish to withdraw and ask the Court to withdraw the--it's acceptance of the plea of the Defendant and we wish to proceed to trial immediately.

MR. TOCA: Your Honor, just by way of correction, Frederick Toca on behalf of the Defendant, we had indicated to the Prosecutor's office that we felt that the offer was out of line, that seven years is outside of Ms. Von Lee Titlow's guidelines. Her guidelines are actually two to five. When I had an opportunity to speak to Mr. Skrzynski, he indicated that he would review that with his office. I spoke to him after that. He indicated they would not accept that. Based upon that, your Honor, we are withdrawing.

MR. SKRZYNSKI: No, no. The offer that was made on the phone by this man was three to fifteen or she would take the fifth.

MR. TOCA: Which is within her guidelines, your Honor.

MR. SKRZYNSKI: That--and I told him-

MR. TOCA: Her guidelines are two-

[Page 5]
MR. SKRZYNSKI:--that I'm not interested in that, your Honor.

MR. TOCA: --to five.

THE COURT: Could you approach for a minute please?

MR. SKRZYNSKI: Sure.

(Bench Conference Begins 9:24:56)

THE COURT: Could we simply say whatever I determine the guidelines to be, but no more than seven years? Because I don't know what the guidelines are. I mean-

MR. TOCA: Your Honor-

THE COURT: --I really don't know what they are.

MR. TOCA: --I understand. I think that Mr. Skrzynski would indicate to you, I think, (undeterminable) she has no priors.

THE COURT: Um hm.

MR. TOCA: She has two misdemeanors.

THE COURT: Okay. What do you think--

MR. SKRZYNSKI: Well, this is only her first murder.

THE COURT: --okay, so what do you think her guidelines are?

[Page 6]
MR. SKRZYNSKI: I'll take--

MR. TOCA: Two to five.

MR. SKRZYNSKI: --two to five, I don't care.

MR. TOCA: They're two to five.

MR. SKRZYNSKI: But she made an agreement that she would go seven years--

THE COURT: Yes.

MR. SKRZYNSKI: --which she understood was above--

THE COURT: Oh, okay.

MR. SKRZYNSKI: --the guidelines.

THE COURT: Oh, oh.

MR. SKRZYNSKI: And she agreed that she would not only do that, but she would waive her appellate remedies about-

MR. TOCA: And that's-

MR. SKRZYNSKI: --superceding the guidelines.

THE COURT: Okay.

MR. TOCA: --just let me say this. That's understood.

THE COURT: Okay.

MR. TOCA: And Mr. Skrzynski indicated to me that the reason he did that was because he feels that this was a first degree murder masquerading as a manslaughter.

[Page 7]
THE COURT: Um hm.

MR. TOCA: Now, I mean, that's bad faith all day. I mean either it's manslaughter or it's not. If it's manslaughter than you-

MR. SKRZYNSKI: Now, that's-

MR. TOCA: --go within the guidelines.

MR. SKRZYNSKI: --that's (undeterminable)--

THE COURT: Okay.

MR. TOCA: If you don't go within the guidelines, that's fine.

THE COURT: I guess I don't know what the guidelines are.

MR. TOCA: He's willing to stipulate, your Honor, that they're two to five.

THE COURT: Okay.

MR. SKRZYNSKI: No, I'll stipulate to whatever the probation department determines the guidelines to be.

MR. TOCA: Your Honor, they're two to five.

THE COURT: Wait, wait.

MR. SKRZYNSKI: Your Honor, I think we should do this on the record.

THE COURT: Okay. It is on the record.

(Bench Conference Ends 9:26:07)

THE COURT: But having said that, I guess I

[Page 8]
don't know what the guidelines are. You're saying they are probably?

MR. TOCA: Two years to five years.

MR. SKRZYNSKI: That could be, Judge. But the fact of the matter is, is that at the time the plea was taken, the Defendant acknowledged the fact that the seven years was above the guidelines, acknowledged that she was going to waive her right to be tried within--or sentenced within the guidelines. Waived her appellate remedies, as far as being sentenced above the guidelines. And now I'm being told that we're proceeding in bad faith, because we're calling this a manslaughter.

MR. TOCA: Your Honor-

MR. SKRZYNSKI: Judge--

MR. TOCA: --your Honor, it is in bad faith.

THE COURT: Okay. Just a moment. Just a moment.

MR. SKRZYNSKI: --the--we make-

THE COURT: I don't know what the guidelines are, Mr. Skrzynski.

MR. SKRZYNSKI: Alright.

THE COURT: And I don't recall whether or not there was an agreement that this was above the

[Page 9]
guidelines. Having said that, the agreement that day was that a man--it would be manslaughter and the sentence would be seven to fifteen.

MR. SKRZYNSKI: That's correct.

THE COURT: That seven would be the maximum on the minimum, appellate rights were waived, I have that and that the Defendant would testify against the codefendant.

MR. TOCA: That's right.

THE COURT: That's all I have. It's, you know, if you client does not want to go with that, I'm going to allow her to withdraw her plea and the Prosecutor has withdrawn it's offer, if she's not going to go ahead with one, two and three. Because I've listed exactly what it is. But I just want to make sure she understands what this means and so if you would inquire of her so we can find out?

MR. TOCA: Certainly. Ms. Von Lee Titlow, do you understand that you are now withdrawing your plea to manslaughter and that the charge of first degree murder will be reinstated?

MS. TITLOW: Yes, your Honor.

MR. TOCA: And do you understand that the maximum penalty for first degree is life in prison?

[Page 10]

MS. TITLOW: Yes, your Honor.

MR. TOCA: And do you do that freely and voluntarily?

MS. TITLOW: Yes, your Honor.

MR. TOCA: You fully understand the consequences?

MS. TITLOW: Yes, your Honor.

MR. TOCA: I don't have any more questions.

THE COURT: Alright. Trial will be January

14th.

MR. TOCA: Your Honor, may we approach please?

THE COURT: Yes.

(Bench Conference Begins 9:28:07)

MR. SKRZYNSKI: Judge-

(Bench Conference Ends 9:28:08)

THE COURT: Well, let's just put it on the record. What's the situation?

MR. TOCA: Your Honor, I'm co-counsel in this case. I just need to make sure the date is going to dicker with Mr. Hatchett's schedule. Your Honor, I understand that the People are in a rush to try this--

MR. SKRZYNSKI: We're not in a rush, your Hono.

THE COURT: No.

[Page 11]

MR. TOCA: But, your Honor, again, in all fairness, I was retained last week. There's a lot of material here. I would simply ask that we come back after this trial and set a date. So I know what my calendar says. I need to find out what my co-calendar--counsel's calendar says.

THE COURT: Let's say this. This matter was up for trial. I was fully prepared in all respects to try it.

MR. TOCA: Yes, your Honor.

THE COURT: I am fully prepared to try it at the conclusion of this case. I'm going to be gracious and give you time to get up to speed.

MR. TOCA: Thank you.

THE COURT: I'm going to give you two months almost.

MR. TOCA: I appreciate that.

THE COURT: And the date is January 14th at 8:30. That is the date--

MR. TOCA: Yes.

THE COURT: --at this point.

MR. TOCA: I understand. Again, I'd like to just have the ability if whatever-

THE COURT: Bring a motion on-

[Page 12]
MR. TOCA: --okay.

THE COURT:--because that is the date. The Court wants to accommodate everybody's schedule, especially my own.

MR. TOCA: I understand.

THE COURT: And that's when it works out for me.

MR. TOCA: Okay.

THE COURT: And I don't think that if we don't do it then, I don't think that Ms. Titlow really is going to want to wait until March or April to have her case heard.

MR. TOCA: I understand that, your Honor, but given the seriousness of the charges, given all of the conflict that's gone on in this case, I think she deserves to have a fair trial. That's the way to have a fair trial, to make sure that both of counsels are up to speed. That's all I'm saying. And I understand the Court wants to accommodate it's schedule, but in fairness, you know, being brought in at the last minute for this thing-

THE COURT: Is January 14th a fair date?

MR. TOCA:--I don't think that's going to be a good date for me, your Honor, and I'm almost certain

[Page 13]
it's not going to be a good--

THE COURT: Why?

MR. TOCA: --date for Mr. Hatchett either.

THE COURT: Why?

MR. TOCA: Because, your Honor, I'm in another proceeding.

THE COURT: A felony trial?

MR. TOCA: No, not a felony trial. Actually this is--

THE COURT: This will take precedence.

MR. TOCA: --I understand that. All I'm asking, your Honor, is to just give me the opportunity to check with Mr. Hatchett, if the 14th is good with him, that's fine. If it's not, your Honor, I would at least like the opportunity to come back here--

MR. SKRZYNSKI: Well, Judge--

MR. TOCA: --wait, wait.

THE COURT: I don't want to spend time on this. If the date changes, it's by motion.

MR. TOCA: That's fine.

THE COURT: For good cause shown.

MR. TOCA: That's fine, your Honor.

MR. SKRZYNSKI: - -Judge, I would also like the Court to obtain a waiver of the speedy trial right.

[Page 14]
The Defense is making this motion. We were ready to try this case a month ago. We're ready to proceed on this case as soon as the Billie Rogers case is over with. They were requesting this adjournment. The Defendant is not on bond. I would ask at this point, that they waive their objection to any kind of speedy trial delayed and their right to any kind of a personal bond.

THE COURT: Would you agree to that?

MR. TOCA: Well, wait, your Honor, I'll waive my--our right to a speedy trial.

THE COURT: Okay.

MR. TOCA: But that thing about personal bond, this is not an adjournment. I mean the file--

MR. SKRZYNSKI: Yes, it is.

MR. TOCA: --was adjourned--the trial was adjourned because there was a plea put in. There is now another trial that's going forward. I was not part and parcel of that, your Honor. So yeah, we'll waive the speedy trial motion.

THE COURT: That's all we needed.

MR. TOCA: But not any--not any motion as to bond.

THE COURT: Any delay--any delay is

[Page 15]
attributable to the Defendant.

MR. TOCA: Defense. Yes.

THE COURT: Any--

MR. SKRZYNSKI: I just want the record to be clear that we are prepared at this time to proceed and that this is a request for a delay at their request.

MR. TOCA: Your Honor--

THE COURT: I think that's pretty self-evident.

MR. TOCA: --your Honor, let's assume that the People are always prepared.

THE COURT: Thank you.

(Court Adjourned, End of Record 9:31:19)

STATE OF MICHIGAN
SIXTH JUDICIAL CIRCUIT COURT
(OAKLAND COUNTY)

01-177745-FC

PEOPLE OF THE
STATE OF MICHIGAN

Oakland County
Judge Wendy L. Potts
People V Titlow, Vonle

vs.

Case No. 01-177746-FC

VON LEE TITLOW
Defendant.
_____/

MOTION
TAKEN BY VIDEO TAPE RECORDING
BEFORE THE HONORABLE WENDY POTTS
CIRCUIT JUDGE
Pontiac, Michigan - Wednesday, December 19th, 2001

APPEARANCES:
For the People: JOHN M. SKRZYNSKI (P33013)
1200 N. Telegraph Road
Pontiac, MI 48341
(810) 858-0656

For the Defendant: FREDERICK M. TOCA (P56608)
485 Orchard Lake Rd.
Pontiac, MI 48341
(248) 334-1587

Fara Duffey
CER 0904
Livingston-Oakland Court Reporting
(810) 229-9487

* * *

[Page 3]
Pontiac, Michigan

Wednesday, December 19th, 2001

9:31 p.m.

COURT CLERK: Calling docket number 38, case number 2001-177745-FC, People of the State of Michigan versus Vonlee Nicole Titlow.

THE COURT: Thank you. Good morning.

MR. SKRZYNSKI: Good morning, your Honor. My name is John Skrzynski on behalf of the Prosecutor.

MR. TOCA: Good morning, your Honor, may it please this Honorable Court, Frederick M. Toca on behalf of the Defendant. Your Honor, I apologize, my co-counsel, Cyril Hall, was supposed to be here this morning. I--

THE COURT: Has he filed an appearance?

MR. TOCA: --I think he has, your Honor. I don't know if the Court got it yesterday, but it would have been--

THE COURT: Who will be trying the case?

MR. TOCA: --myself and Cyril Hall, your Honor.

THE COURT: Okay.

MR. TOCA: I think I initially indicated to the Court that Albert Hachette was. He is unavailable

[Page 4]
to try the case at all.

THE COURT: When did you ask--when did you request the transcript, because when we called the court reporter, she said you have not made a request.

MR. TOCA: Your Honor, we just requested the transcript yesterday.

THE COURT: She said, she can have it done, if you had done it by Monday, by Christmas. So now, on an expedited basis, I'm assuming it will probably be done by New Year's.

MR. TOCA: Okay, your Honor. Assuming we can get it by New Year's, it is our belief that we can file a motion to dismiss based upon that transcript. Now, of course, we've got to have time to go through that transcript. It's a lengthy transcript, as I understand it from Mr. Piszczatowksi, your Honor. Also, Mr. Hall, as I indicated is going to be co-counsel in this case.

THE COURT: Right.

MR. TOCA: Is not available to try the case in January. He'll actually be in Vegas trying a federal case during that time. The Court had indicated to us when I appeared before you before, that the next available date that you had was late

STATE OF MICHIGAN
SIXTH JUDICIAL CIRCUIT COURT
(OAKLAND COUNTY)

01-177745-FC

PEOPLE OF THE
STATE OF MICHIGAN,

Oakland County
Judge Wendy L. Potts
People V Titlow, Vonle

vs.

Case No. 01-177746-FC

VON LEE TITLOW
Defendant.
_____/

MOTION
TAKEN BY VIDEO TAPE RECORDING
BEFORE THE HONORABLE WENDY POTTS
CIRCUIT JUDGE
Pontiac, Michigan - Wednesday, February 6th, 2002

APPEARANCES:

For the People: JOHN M. SKRZYNSKI (P33013)
1200 N. Telegraph Road
Pontiac, MI 48341
(810) 858-0656

For the Defendant: FREDERICK M. TOCA (P56608)
485 Orchard Lake Rd.
Pontiac, MI 48341
(248) 334-1587

Fara Duffey
CER 0904
Livingston-Oakland Court Reporting
(810) 229-9487

* * *

[Page 3]

Pontiac, Michigan

Wednesday, February 6th, 2002

13:58 p.m.

THE DEPUTY: Add on matter, your Honor, calling the People versus Vonlee Titlow, docket number 01-177745-FC for pre-trial.

MR. SKRZYNSKI: Good afternoon, your Honor. My name is John Skrzynski, I'm here for the Prosecutor.

MR. TOCA: Good afternoon, your Honor. May it please this Honorable Court, Frederick M. Toca on behalf of the Defendant, Vonlee Titlow. Your Honor, today is the date and time and place set for a pretrial in this matter. As we previously discussed, your Honor, at this time the Defense will be tendering a motion to withdraw for reasons, break down of communication but also some other issues. But we would respectfully ask to withdraw from this matter.

MR. SKRZYNSKI: Judge, if I may, there was pending for today, for this morning, a motion to extend the time for pre-trial motions. My understanding is that Mr. Toca has now withdrawn that motion. We filed an answer, but I understand that that motion is no longer being pursued by the Defense. We had an opportunity to discuss this matter this morning in chambers,

[Page 4]
Myself, Mr. Toca and yourself and the basis for the motion for withdrawal was placed before the Court. My feeling is I'm objecting to anything that will delay the trial of this matter. This matter has been pending since last January, January of 2001. We had one trial in this matter around the early part of December. That matter was decided. This Court adjourned this matter from January the 14th to the date of March the 4th, which is a month from now. This motion is going to occasion another delay in this case and I understand the reasons that were put forth for the Court this morning and I understand why Mr. Toca is making this motion. But I still want to place on the record my strenuous objection to any further delay in this matter. We are ready to proceed on March the 4th. We are asking the Court to proceed on that date.

THE COURT: Yeah. I have concerns. I went back and I reviewed two motions filed. One, I need an adjournment to get a transcript.

MR. TOCA: Correct.

THE COURT: No transcript was ordered.

MR. TOCA: Correct. And your Honor, I think

[Page 5]
THE COURT: I need an adjournment because Cyril Hall has a conflict. Cyril Hall never appeared in this case.

MR. TOCA: --your Honor, there's only been one adjournment requested since I've been an attorney on this case.

THE COURT: Well, the case--

MR. TOCA: It had nothing to do with Mr. Hall having to get the transcripts.

THE COURT: --okay.

MR. TOCA: And that was, as indicated by Mr. Skrzynski, there was a trial date set for my trial. That was bumped in favor of the co-defendant. At that point, the Court said, look, we're going to go some time in January. We indicated to the Court because that trial concluded a little bit quickly, I think it was done in seven days, we didn't have enough time to order the transcripts. We got the cost of the transcripts, $6,000. Well, the problem I discussed with the Court arose.

THE COURT: When did you--

MR. TOCA: We thought we had--we thought we had taken care of that, but unfortunately there are some budgetary constraints, which just, quite frankly,

[Page 6]
can't be overcome. And as I indicated to the Court--

THE COURT: I know, I gave an adjournment to get a transcript. Nobody came back in to tell me I didn't get the transcript. I assumed the transcript was ordered and we were ready to go.

MR. TOCA: --your Honor, I don't think that I would be spinning tales if I told you we have done everything possible to try and rectify the problem that I've indicated. Which also deals with the transcript. Now, I understand what Mr. Skrzynski is saying. But, your

Honor, this would only be the second trial date set--excuse me, second trial date set on my watch. The first trial date set on my watch. And your Honor, again, if the Court has some solution to this problem, we would be more than happy to listen to it, but we don't.

MR. SKRZYNSKI: For the record, Judge, this--although Mr. Toca is correct about his own participation in this case, the March 4th date is the fourth trial date that has been set.

THE COURT: I know. I mean I blocked out at least one week or two weeks of my next term to try this case. I have done everything to try to accommodate. Have any financial arrangements been

[Page 7]
made Mr. Toca?

MR. TOCA: Through--I think she'll indicate through family members--

THE COURT: Has--

MR. TOCA: --certain--certain financial arrange ments have been made, unfortunately, her family indicates that they may not be able to come through with them and if they are, it's not going to be until the end of this month. And, of course, that gives us four days til trial and I think Ms. Titlow will tell you, quite frankly, that you know certain representations have been made by other family members of hers, that this was taken care of. It has not been taken care of.

THE COURT: Are you going to come through and-- have you retained Mr. Toca? Have you paid any money to Mr. Toca?

MS. TITLOW: Just some jewelry, that's all.

THE COURT: No money?

MS. TITLOW: There was an agreement on a-- supposedly on a book deal.

MR. TOCA: But that's--

MS. TITLOW: That's how I retained his service.

THE COURT: On a what?

[Page 8]

MR. TOCA: Your Honor, there was initially, per the first attorney in this case, a book deal on this table, that fell through as well.

THE COURT: Oh.

MR. TOCA: Given the profile on this case. But, your Honor, this has nothing to do with my retention. I mean this has to do with trying to retain experts. Trying to get transcripts, etcetera, etcetera.

THE COURT: Who was going to represent you in this case?

MS. TITLOW: I don't have anyone if he don't.

THE COURT: Okay. You would need court appointed attorney?

MS. TITLOW: Yes.

THE COURT: Well, I understand what you're saying Mr. Skrzynski, I would like to try the case too then. But I don't--I want Ms. Titlow to have representation and--

MR. SKRZYNSKI: I understand, Judge. I want to further point out that Mr. Toca represented this morning that neither he nor Mr. Hall are on the appointed list.

THE COURT: --right.

[Page 9]

MR. SKRZYNSKI: So, the case couldn't be assigned to them.

THE COURT: Yes. I know.

MR. TOCA: That's correct, your Honor.

THE COURT: Yep. Do you still anticipate being able to retain him or do you want court appointed counsel?

MS. TITLOW: I just want it over with. Whatever is the best.

THE COURT: Okay. Alright. I will allow you to withdraw and I will get court appointed attorney and--

MR. TOCA: Judge, can we approach on the court appointed?

THE COURT: Yeah.

(Bench Conference Begins 14:04:25)

MR. TOCA: Ms. Titlow has requested, and I left a message for, Mr. Oliver.

THE COURT: I'm going to appoint. She doesn't get to pick.

MR. TOCA: No, no. I understand.

THE COURT: Yeah, what about Mr. Oliver?

MR. TOCA: That I mean of course she doesn't get to pick.

[Page 10]
THE COURT: No. She doesn't get to pick.

MR. TOCA: Okay. That's fine, Judge.

THE COURT: No, I mean--

MR. TOCA: She asked me to tell you that.

THE COURT: --I--she can--just tell her that I will be appointing.

MR. TOCA: Okay.

THE COURT: Yeah.

(Bench Conference Ends 14:04:50)

THE COURT: Alright. I'm going to set this matter for a pre-trial next week. Is that alright? I want to bring in the new attorney.

MR. SKRZYNSKI: A week from today?

THE COURT: Yes.

MR. SKRZYNSKI: At 1:30?

THE COURT: Yes.

MR. SKRZYNSKI: Very well, your Honor. In the meantime--

THE COURT: There will be a pre-trial--

MR. SKRZYNSKI: --you're granting his motion to withdraw?

THE COURT: --I am granting the motion to withdraw and I'm going to set the matter for a pretrial on the 13th at 1:30, so we can move the matter

[Page 11]
along.

MR. SKRZYNSKI: Thank you, your Honor.

THE COURT: Thank you.

MR. TOCA : Thank you.

(Court Adjourned, End of Record 14:05:16)

STATE OF MICHIGAN
SIXTH JUDICIAL CIRCUIT COURT
(OAKLAND COUNTY)

PEOPLE OF THE
STATE OF MICHIGAN,

vs. Case 01-177745-FC

VON LEE TITLOW
Defendant.

Oakland County
Judge Wendy L. Potts
People V Titlow, Vonle

TRIAL
TAKEN BY VIDEO TAPE RECORDING
BEFORE THE HONORABLE WENDY POTTS
CIRCUIT JUDGE
Pontiac, Michigan - Tuesday, March 12th, 2002

APPEARANCES:

For the People: JOHN M. SKRZYNSKI (P33013)
1200 N. Telegraph Road
Pontiac, MI 48341
(810) 858-0656

For the Defendant: WILLIAM L. CATALDO (P37673)
29350 Harper
St. Clair Shores, MI 48081
(248) 354-6677

Fara Duffey
CER 0904
Livingston-Oakland Court Reporting
(810) 229-9487

[Page 2]

TABLE OF CONTENTS

	PAGE
Opening Statement by Mr. Skrzynski	4
Opening Statement by Mr. Cataldo	20

WITNESSES: (PEOPLE)

LYNN GIORGI

Direct examination by Mr. Skrzynski	39
Cross examination by Mr. Cataldo	65
Redirect examination by Mr. Skrzynski	97
Recross examination by Mr. Cataldo	104
Redirect examination by Mr. Skrzynski	108
Recross examination by Mr. Cataldo	109

Pete Dungjen

Direct examination by Mr. Skrzynski	110
Cross examination by Mr. Cataldo	131
Redirect examination by Mr. Skrzynski	162

Jeff Berryhill

Direct examination by Mr. Skrzynski	167
Cross examination by Mr. Cataldo	177

Danny Chahine

Direct examination by Mr. Skrzynski	198

WITNESSES: (DEFENDANT)

(None)

EXHIBITS	IDENTIFIED	RECEIVED
PX#1-7 Photographs of scene	43	44
PX#8 Diagram of house	49	50
DX#A-B Police Reports		
PX#9 Defendant's Written Stmt	58	58
PX#10-11 Photograph of Defendant	200	200
PX#13 Taped Conversation	239	239
PX#14 Transcript of #13	240	240

* * *

[Page 40]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Lynn Giorgi}

Q On August the 12th of 2000, do you recall that date?

A Yes, I do.

Q What was your rank then?

A I was working as a police officer on the midnight shift, working patrol.

Q Were you in uniform?

A Yes, I was.

Q Were you driving a marked car?

A Yes.

Q Alright. I want to point out the hour of around 4:25 in the morning on August the 12th, do you recall that time?

A Yes.

Q What happened that time, Officer?

A Officer Pete Dungjen and I were dispatched to an address on Grenadier Street for a man who was unconscious and not breathing.

Q Was that 2090 Grenadier?

A Yes, it was.

Q And what city is that ma'am?

A The City of Troy.

Q Okay. Did you go there?

A Yes, I did.

Q When you arrived, were you driving by yourself or with Pete?

* * *

[Page 43]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Lynn Giorgi}
A I was directed into the kitchen and Officer and Dungjen and I went in there and observed who we later found out to be Mr. Rogers, laying on his back near the kitchen floor.

Q Okay. Let me just stop you for a second and I want to show you what have marked as proposed Exhibits Numbers 1 through 7. And would you please just briefly look at those. Alright. Now to begin with ma'am, are Exhibit Numbers 1 through 7 a series of photographs?

A Yes, they are.

Q And do you recognize what is depicted in those photographs?

A Yes.

Q What?

A These pictures depict Mr. Rogers in the position that we found him in when we entered the house.

MR. CATALDO: Your Honor, I would ask if she could keep her voice up.

THE COURT: You're going to have to keep your voice way up.

THE WITNESS: Excuse me.

BY MR. SKRZYNSKI:

A The pictures depict Mr. Rogers as we found him when we entered the home.

Q Alright. Are those true and accurate representations

[Page 44]
of what the scene looked like on that morning when you came upon Mr. Rogers?

A Yes.

MR. SKRZYNSKI: Alright. At this time, your Honor, I would move to admit Exhibit Numbers 1 through 7.

MR. CATALDO: If I could quickly review them, your Honor. No objection, your Honor.

THE COURT: Alright. They are admitted.

MR. SKRZYNSKI: Thank you, your Honor.

BY MR. SKRZYNSKI:

Q Alright. Now, Detective, I want to go through these. Exhibit Number 1, can you describe for the record what that depicts?

A It's a picture of Mr. Rogers. He's laying on his back, next to the kitchen table and chair.

Q Alright. And can you tell us what is by his--what is it? His left hand?

A It's a glass.

Q Okay. Did you see that--that glass on that date?

A Yes.

Q Was that glass or plastic?

A Plastic.

Q And the type of floor that Mr. Rogers is lying on, can you describe for the jury what kind of a floor that

[Page 45]
is?

A Ceramic tile floor.

Q Alright. Is it a hard tile?

A Yes.

Q Okay. Exhibit Number 2, ma'am, can you tell us what that depicts?

A That appears to be a picture from the same area, just farther removed so you can see more of the kitchen.

Q Okay. Now, ma'am, there appears to be an overturned chair that's not fair from Mr. Rogers' head, is that correct?

A Yes.

Q Alright. Did that position of that chair change at any time when you were in the house?

A Yes. I moved that chair.

Q Can you tell the jury exactly what you did to move it?

A Yes. When I approached Mr. Rogers, I wanted to kneel beside his chest to assess his breathing and heart rate and that chair was in my way. It was--when I found it, it was still on it's side like that, but it was more in the middle of his chest, which is where I wanted to kneel, so I pushed it in the same position and I just pushed it out of my way.

Q Alright. Did you change the angle of the chair?

A No.

[Page 46]
Q Or the position--or the orientation of the chair?

A No. It was still laying on it's side.

Q Okay. Did you move Mr. Rogers' body in any way?

A No, I didn't.

Q Okay. This is Exhibit 3. Can you describe to the jury what is being shown in Exhibit 3?

A Another picture of Mr. Rogers from a different angle, coming from more the--from the legs towa: . s the head.

Q This is Exhibit Number 4, what does that--what does that show now?

A Another picture of the body from a different angle, looking through a chair.

Q Okay. This is Exhibit 5, ma'am, what does that show?

A That shows what you would see from the hallway when you enter the home into the kitchen.

Q Okay. Now, do you see that cabinet area, where there's--there's a sort of cream color cabinet with the brown stripe across it, do you see that?

A Yes.

Q Alright. And what's on top of that cabinet?

A The sink.

Q Alright. The sink is there. And how far away from the sink was Mr. Rogers' body on the floor?

A Not very far.

Q Okay. There's -- there appears to be sort of a bag

[Page 47]
laying on the floor there, is that correct?

A Yes.

Q And what is that?

A That's a bag containing--or a blanket containing Mr. Rogers' body.

Q Okay. So his body is still lying on the floor, but it's now covered?

A Yes.

Q Alright. This is Exhibit Number 6, ma'am. Can you describe for the jury what that depicts?

A Another picture of Mr. Rogers from--coming from a angle, directing from his head towards his feet.

Q Okay. The head is in the foreground?

A Yes.

Q Okay. And finally, this is Exhibit Number 7. Would you describe for the jury what that depicts?

A Another picture of Mr. Rogers from a different angle.

Q Is the sink depicted in that picture as well?

A Yes. It's at the top here.

Q Alright. That's the sink right there?

A Yes.

Q Okay. Was there another sink in the kitchen?

A I don't remember.

Q Okay. And that's just a few feet away from Mr. Rogers' body?

[Page 48]
A Yes.

Q Alright. Now, when you came upon Mr. Rogers, were his legs in the crossed position like that?

A Yes, they were.

Q You did not change that?

A No.

Q Okay. And you did not change the position of the body at all?

A No.

Q Well, after you saw Mr. Rogers--by the way, did you examine Mr. Rogers' body at all for injury?

A Yes.

Q And did you move his body to examine it?

A No, I didn't move his body, but I saw no obvious signs of trauma.

Q Okay. No obvious signs of trauma? Any other type of injury?

A No.

Q Okay. Did you make any kind of determination or did anybody with you make any determination about whether Mr. Rogers was alive or dead?

A Yes. I was preparing to open the CPR first aid kit-kit and Officer Dungjen had been observing the body and told me that it looked like he was obviously deceased and I--

[Page 49]
Q Okay. Did it appear to you that he was dead?

A --yes.

Q Okay. Now, at this point, ma' am, what exactly did you do?

A Well, at that point, there were no resuscitation efforts, as he was obviously deceased and Officer Dungjen and I spoke with Mrs. Rogers to determine what type of medical history Mr. Rogers may have had.

Q Where was Mrs. Rogers?

A She was in the den area in the front of the home.

Q Okay. I want to show you what I've marked as People's proposed number 8 and ask you, first of all, is that a piece of paper?

A Yes.

Q Okay. And on that paper, there's something depicted?

A I'm sorry?

Q Is there something depicted on that piece of paper?

A Yes. It's--

Q What does it show?

A --the first floor of the home.

Q Okay. Is that--it's a diagram?

A Yes.

Q Is that a true and accurate diagram of that house?

A Yes.

MR. SKRZYNSKI: Okay. At this time, your Honor,

* * *

[Page 52]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Lynn Giorgi}
{Q} in there do you know?

A I don't remember.

Q You don't know. Alright. You went to that room though, right?

A Yes.

Q Alright. Can you describe for the jury the demeanor of Billie Rogers?

A She was very quiet, kind of was chain smoking cigarettes and very calm.

Q Did that seem unusual to you?

A It did.

Q Why?

A She was very, very calm. She really wasn't talking at all and I thought that she was probably in shock.

Q Okay. What did you ask of those people?

A What had happened that night? How they had found him? What their whereabouts were? And Officer Dungjen and I both spoke with them at different times regarding that subject.

Q What was said?

A That they had went to--Ms. Rogers and Nicole Titlow had went to a casino that night. That Mr. Rogers didn't want to go and upon coming home, they found him on the floor.

Q Okay. That was it?

[Page 53]
A That's basically what they told me. I can't really remember any more details than that.

Q Did you collect some medical history about Mr. Rogers?

A I did.

Q And what was that?

A Mrs. Rogers explained to me that Mr. Rogers was a chronic alcoholic and suffered from some medical problems associated with that. He had, on occasion,

passed out. One particular time he passed out, she told me he passed out and hit his head on the bathtub and was bleeding. And also, she stated that he suffered from rectal bleeds, due to alcoholism and actually showed me a chair in the family room where there were some real small kind of dry blood stains.

Q Did you--did she indicate to you that Mr. Rogers had any kind of history of continuing illness? Like for example, heart problems?

A No.

Q Did she relate to you any kind of a chronic medical condition, other than his alcoholism?

A No.

Q Did you get the idea that he had been a sick man?

A No.

Q As you were speaking to these people, now, can you describe Defendant Titlow, what was his demeanor like?

[Page 54]
A We--when I began asking questions, she got very upset. Was very protective of Mrs. Rogers and at certain points, she actually began yelling at me because I was asking them these questions of when they had found him and where they had been.

Q What questions were you asking?

A I was--well, I was asking just general questions that we would ask anybody else, about where they had

been, when they carne home. And again, I was asking about his medical condition. And she was upset that I would be asking such questions.

Q Are those routine questions that you always ask?

A Yes. That's information that's required, that I have to--you know, we have to put in our report, just to be thorough.

Q Do you remember anything that Titlow actually said to you?

A Yes. She said--

Q Tell us.

A --she said--pardon my language, well, he's fucking dead. We walked in and he's fucking dead.

Q That was it?

A That was one comment that she made. She also said that I was very rude to ask such questions and that she was from down south and the police officers down

[Page 55]
south aren't rude like that.

Q Were you being rude?

A No. I was just doing my job.

Q Now, ma'am, have you encountered excitable relatives when you--you've went to death scenes before, have you not?

A Yes.

Q And have you encountered excited relatives at a death scene?

A Yes.

Q Was this any different then those?

A Yes. These--

Q How?

A --these two women seemed to be at the extremes of a scale of normal people that I would come in contact with. Mrs. Rogers was extremely quiet, didn't want to answer questions and didn't really ask me any questions and Ms. Titlow--

Q Was that unusual? That Mrs. Rogers didn't ask you any questions?

A --yes.

Q Why?

A Normally, you know, someone would be asking what's going to happen next. Wanting to be calling other family members.

[Page 56]
Q But that wasn't happening here?

A No.

Q Do you know that there's ever any effect on, you know, distraught families when you go to a death scene

when you're asking questions? Do those questions have those kind effect on people?

A To make them upset--

Q Yes.

A --and angry at me? No.

Q What kind of--what kind of reactions do they usually elicit?

A Well. most people normally understand that it's just our job, we have to obtain information. It's part of doing a thorough investigation or a preliminary investigation in our case.

Q Can you describe the volume of the voice in which Titlow spoke to you?

A Well, I was just a few feet from her and she was yelling at me. Yelling these things about, you know, he's just dead and you know why are you doing this she kept saying. Can't you see that she's upset, you know, pointing at Ms. Titlow. Why are you asking these--

Q Ms. Titlow?

A --or to Mrs. Rogers.

[Page 57]
Q Okay.

A Can't you see that she's upset? Why are you asking us these things?

Q Did you ask them to do anything else?

A Well, I asked them to make out a written statement about the same things that they had told me about where they had been. And I got from Officer Dungjen some forms, some standard forms that we use, for witnesses to fill out, make statements and sign.

Q Is that standard procedure?

A Yes.

Q Was that done here?

A Yes.

Q Well, can you describe to the jury how--how Titlow went about doing that?

A She didn't want to make out a statement, kept asking why it was necessary. She actually started writing and then put the pen down again and started asking me, why do we have to do this? Can't you see how upset she is? You know, why is this necessary?

Q Did Titlow eventually complete a written statement?

A She did, but it was very short.

Q Alright. I'm going to mark here, proposed Exhibit Number 9 and show this to you. First of all, is that a piece of paper?

* * *

[Page 62]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Lynn Giorgi}
Q Okay. When you went to the basement, did you notice anything unusual down there?

A No. It's furnished there. There was a bedroom and bathroom.

Q Okay. Let me ask you this, ma'am. Did you notice anything that was out of place in this house? That appeared to you to be out of place?

A No.

Q Did you notice any liquor bottles around anywhere?

A There were liquor bottles in the family room.

Q Okay.

A In a bar area.

Q There was a bar? Is that depicted right here?

A Yes.

Q This is the family and this is the bar right here?

A Yes.

Q And you said there were liquor bottles there?

A Yes.

Q Where were they?

A On the wall, on shelves behind the bar.

Q Did they appear to you to be in places where they were normally stored?

A Yes.

Q Where--was anything out? Were there liquor bottles lying around or standing out anywhere?

[Page 63]
A No.

Q Nowhere?

A No.

Q How about any other kind--besides that cup that was the--that cup that was next to Mr. Rogers, was there any other cup or glasses or ice trays or anything anywhere?

A No.

Q Did there--was the--was the house disturbed in any way?

A No, it was very neat.

Q Were there any ashtrays filled with cigarette butts?

A Not that I remember.

Q Did you see any alcohol, besides those bottles by the bar, anywhere else in the house?

A There were some alcohol bottles in the pantry in the kitchen.

Q Alright. And can you describe to the jury those?

A They were--

Q This pantry is labeled pantry area, is this the area you're talking about?

A --yes.

Q Alright. And there were alcohol bottles there?

A Yes.

Q What kind?

[Page 64]
A I believe they were vodka. They were very large, plastic. They may have been gallon. You know, they were quite large.

Q Did they appear to be opened or closed?

A They were closed.

Q Were they full?

A Yes.

Q Did you ever go upstairs into this house?

A Yes, I did.

Q And what did you see upstairs?

A Well, when Mrs. Rogers told me that on one occasion Mr. Rogers fell and hit his head on the bathtub, I suggested that maybe we go upstairs to see if he had done that that night. So she took me upstairs and I went into each of the bedrooms and didn't see anything unusual.

Q No blood stains or anything up there?

A No.

Q Alright. Did you see any blood stains anywhere in the house?

A There was some blood stains on the chair that she showed me that was his chair.

Q Who showed you?

A Mrs. Rogers.

Q Okay. That was Mr. Rogers chair?

* * *

[Page 80]
{Q = Cross examination by Mr. Cataldo;
A = People's Witness Lynn Giorgi}
Q And so in the 20 or 25, this one itself is unique in it's own way for you?

A Yes.

Q As some of the other ones you have been on are unique in their own way?

A Yes.

Q You indicate that you didn't find any ashtrays, but you really weren't looking for ashtrays, were you, when you talk about the house being in pretty good shape?

A That's correct.

Q And it did not appear that there were any ashtrays or anything spilled in the kitchen itself?

A Yeah, I don't--I don't remember.

Q Now, there, according to the photographs, is a plastic glass within a very short distance of Mr. Rogers' hand?

A Yes.

Q Did you see any fluid on the ground at the time that you were near that glass?

A No, I didn't.

Q Did you smell any fluid or alcohol?

A No, I didn't.

Q Did you check the area then for, specifically the kitchen, for bottles of alcohol?

[Page 81]
A There were no bottles of alcohol observed in the kitchen.

Q When you talk about to the Prosecutor that you went from point A, the pantry, to a garage, to the bar, a variety of other places, were you specifically looking for alcohol?

A No.

Q You just did a check of the house?

A Yes.

Q And then as a part of that check, you noticed alcohol behind the bar?

A Yes.

Q And you noticed alcohol behind the--or in the pantry I believe it was?

A Yes.

Q Bottles of vodka. Did you know that Mr. Rogers kept his vodka in the freezer?

A No, I didn't.

Q Did you check the freezer?

A No, I didn't.

Q Did you check the refrigerator?

A No.

Q Did anybody give you that information at that time?

A No.

Q If they had given that information, would you have

* * *

[Page 101]
{Q = Redirect examination by Mr. Skrzynski;
A = People's Witness Lynn Giorgi}
{Q} report, unless you're asked to do so?

A Well, my impression might not be correct.

Q Um hm.

A And might mislead the investigation.

Q Okay. So, Tullock simply asked you what? To do what?

A To write down things that I could remember.

Q And that's what you did?

A Yes.

Q And that was on November the 22nd of 2000?

A That's when I wrote the report.

Q Alright. That's some three months later, right?

A Yes.

Q Alright. Now, let's talk about the actual scene, on August the 12th. You're trained to deal with people who are driving drunk, right?

A Yes.

Q And are you trained that there is anything unusual about their appearance?

A Yes.

Q What do you normally--what are you trying to look for when you're looking at somebody who you suspect is driving drunk?

A Red glassy eyes.

Q Did Titlow have red glassy eyes?

A Not that I know--remember, no.

[Page 102]
Q You don't remember that? What else?

A Slurred speech.

Q Did Titlow have slurred speech?

A No.

Q Okay. What else?

A A noticeable smell of intoxicants coming from their person.

Q Did Titlow have a noticeable smell of intoxicants coming from him?

A No.

Q What else?

A Not being able to function properly or walk or write or pick things up.

Q Did--did Titlow have any problems walking?

A No.

Q Did Titlow stumble?

A No.

Q Did she sway--or he sway as he was standing there?

A No.

Q When you asked Titlow questions, did he seem to understand what you were saying?

A Yes.

Q Did he ask you to repeat what you were saying?

A No.

Q Did he ask you to explain what you were saying?

[Page 103]
A No.

Q Did he make appropriate responses, other than the volume?

A Yes. Well, except for swearing at me.

Q Okay. So, was there any indication to you, as a person who is trained to observe people who have been drinking, that Titlow had been drinking?

A No.

Q Okay. Was the anger that Titlow exhibited, was that like general anger about everything?

A No, I think she was angry at me.

Q About what?

A For asking questions.

Q Specifically for asking the questions?

A Yes.

Q Did Titlow express anger for anything else?

A No.

Q Did Titlow say that he was angry with you because he--

MR. CATALDO: Objection, leading question.

THE COURT: Sustained.

BY MR. SKRZYNSKI:

Q --so, was the--was anybody else in the house at the time that you were there, besides you, Officer Dungjen and the Mrs. Rogers and Titlow?

A The ambulance driver.

* * *

[Page 119]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Pete Dungjen}
A --sitting on a couch.

Q --pardon?

A They were sitting on a couch and we were directly in front of them, so.

Q Okay. Are you trained, sir, in the course of your police duties to deal with people who have been drinking while driving? Drinking at all, in any various context, like driving, bar fights, things like that?

A Yes.

Q Alright. And what are you taught to look for or what do you--what do you expect to see in someone who is intoxicated?

A Speech, slurred speech.

Q Did you notice that Titlow had slurred speech?

A I did not notice any slurred speech.

Q Alright. What else do you look for?

A An odor of intoxicants, alcohol, smell of alcohol.

Q Any odor of intoxicants coming from Titlow?

A I did not--I could not smell an odor of intoxicants.

Q Were you close enough to be able to?

A Yes.

Q You were. What else do you look for?

A Blood shot eyes, flushed face, poor--

Q Excuse me. Blood shot eyes and flushed face, did

[Page 120]
Titlow have either of those?

A --I did not notice that. I was not that close to notice her face with make up on and the eyes. It was not--

Q What else do you notice?

A --just their general--how coordinated they are, the loss of coordination that accompanies being--

Q Did you notice--

A --intoxicate.

Q--any loss of coordination by Titlow?

A No.

Q Alright. Now, you weren't looking for those things, were you?

A No.

Q Okay. Had you observed them, would you have noted that--

A I didn't--

MR. CATALDO: Objection, speculation--

BY MR. SKRZYNSKI:

A --I did notice--

MR. CATALDO: --your Honor.

BY MR. SKRZYNSKI:

Q Are you trained to note those things? If you note those things, are you trained to mention them?

A I felt that--yes.

[Page 121]
Q Alright. You felt what?

A That her demeanor was out of place as to her excitability. I understand that it was an unusual scene

at that time for a family member to come home and find, but she seemed more agitated and excited and it just seemed out of place to me.

Q How about Billie Rogers? How was she behaving in that room?

A Very calm.

Q What happened next?

A I --after Nicole calmed down, I left Officer Giorgi there to continue collecting information and talking with them and returned to the kitchen.

Q Did you collect any information in regards to Mr. Rogers' prior medical history?

A Billie Jean told us that he was a chronic alcoholic and that he had a--some sort of intestinal or stomach problem that he has had for quite some time.

Q Did Mrs. Rogers indicate to you at all about the amount of alcohol he drank?

A I believe it was a large--I'm not sure if it's a gallon or liter size bottle, the large--I can't--I don't know what size that is. The largest plastic bottle of alcohol that you can buy. I think it's a gallon or liter type bottle a day.

* * *

[Page 140]
{Q = Cross examination by Mr. Cataldo;
A = People's Witness Pete Dungjen}
{Q} be my guess?

A Yes.

Q Some were people who are real agitated, some people are hysterical?

A Yes.

Q And in listening to your testimony earlier this morning, it seems to me that we had two real extremes or you were observing two real extremes on the morning of August 12th?

A Yes.

Q It was odd that somebody would be as calm and I would use the term maybe disenfranchised or just too calm for example and I think you wrote that in one of your reports or you stated that previously that she was real calm?

A Yes.

Q Too calm? Right?

A I don't know if I wrote too calm--

Q No, no.

A --but yeah.

Q I'm just asking for your impression.

A Right. Yes. That she was calm.

Q And I think that would probably be why you indicated that when you got to the front door, she just

points and says the body's back there or he's back--I mean

[Page 141]
just like no emo--I mean you would expect more, right?

A Correct.

Q And yet on the opposite side completely of the spectrum, we have Ms. Titlow who to you it was suspicious because she over reacting to everything and not necessarily to the death, but focusing her anger at the wrong place?

A Correct.

Q And she was focusing her anger at Officer Giorgi?

A Correct.

Q And at that time even, I believe you indicated that you went over into the area where you heard the loud voices, just to be sure that everything was okay?

A Yes.

Q And it was clear Officer Giorgi was doing everything she could to calm down Ms. Titlow?

A Yes.

Q It didn't seem to be working though, right?

A Not very well.

Q Not very well.

A No.

Q Alright. Now, in--in getting back to the first question I was going to ask you in those photographs, the glass that you see in those three photographs, that is the location of the glass as you first

* * *

[Page 151]
{Q = Cross examination by Mr. Cataldo;
A = People's Witness Pete Dungjen}
{Q} there, you walked through it just to take a look, satisfy your own curiosity as to whether or not there was anything of any value downstairs?

A Correct.

Q The scene in the kitchen of those photographs that I showed you, one of the things you found remarkable about the--remarkable about that was the position which Mr. Rogers was laying?

A Yes.

Q And there were probably a couple of things that made you suspicious. The first being the legs were crossed?

A Yes.

Q And those legs were crossed, I believe his legs were crossed at the ankles?

A Yes.

Q And it also appeared that he was somewhat underneath the kitchen table?

A Yes.

Q Just what was--what was odd about the fact that it appeared to you that he was underneath the kitchen table?

A In my opinion, the positioning of the chair would suggest to me that--

Q The chair being the one that was tipped over?

[Page 152]
A --the chair was tipped over on it's--

Q Okay.

A --on it's side.

Q Alright.

A Which suggests to me that he may have been sitting at the kitchen table when something happened to him, whether it be a heart condition or something that caused him to fallout of the chair. I would expect to find the body in a different position. More on it's side, as if it had fallen out of the chair. Not lying flat, stretched out with the feet, the legs crossed and somewhat under the kitchen table. I would expect to find that position if he had slid out of the chair. But then I wouldn't expect to the see the chair turned over. So, that looked out of place to me.

Q And when you say out of place, you're not necessarily giving it a value that it was good or that it was bad, but in your experience it seemed odd, it wasn't normal?

A Correct.

Q And as an officer you know that in these unexpected death scenes, you're there. EMS shows up at some point and if in fact the body of the person is dead, the medical examiner has to come to the scene?

* * *

[Page 166]
{Q = Redirect examination by Mr. Skrzynski;
A = People's Witness Pete Dungjen}
{Q} the cup that was in the--on the coffee table?

A I believe the medical examiner, Allegrina, did pick it up when we mentioned to him the alcohol--the alcoholism, he picked up the cup and smelled it and I think he said well, this is not alcohol and set the cup down.

Q Okay. That was the cup on the coffee table in the family room?

A No. That was the cup at--

Q Oh, next to Mr.--

A --next to Mr. Rogers.

Q --I see.

A What was in the family room, I never touched it.

Q Okay.

A Just picked it up and smelled it.

Q Okay. Now, you said that the information you got about one to two gallons of alcohol a day, consumption by Mr. Rogers, came from Billie Rogers?

A Correct.

MR. SKRZYNSKI: Thank you. I have nothing further.

THE COURT: Mr. Cataldo?

MR. CATALDO: No, your Honor.

THE COURT: You may step down and you're excused.

* * *

[Page 172]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Jeff Berryhill}
A Right.

Q So if you say the pronouncement comes at 4:50 a.m. that doesn't mean that he actually died at 4:50 a.m., right?

A Correct.

Q What did you do--did you move Mr. Roger at all?

A No.

Q Okay. What happened then?

A After calling the hospital, I talked to one of the officers and got information from him, name, age, birth date and such.

Q Okay. What did you learn about Mr. Rogers?

A I learned that he was a chronic alcoholic. That's the only medical history that I got. That he was 74 years old.

Q Did you ever speak to Billie Rogers?

A No.

Q Did you ever speak to Nicole Von Lee--Von Lee Nicole Titlow?

A No.

Q Did anybody in that family ever talk to you?

A No.

Q No one asked you what your opinion was regarding the cause of death of Mr. Rogers?

A No.

[Page 173]
Q How many death scenes have you visited as an EMT?

A Over 100.

Q Was this in any way different than the others?

A It was unusual, yes.

Q What was unusual?

A That nobody came and talked to me.

Q What do you usually experience?

A I usually experience families very upset, especially if it's unexpected. They want to know what's going on, what's going to be done. They usually give me the history of the patient, usually right there and that didn't happen this time.

Q Have there been other times when this has happened?

A Very few.

Q So this is by far the exception?

A Yes.

Q Now, those photos that you're looking at. Are those pretty much true and accurate representations of what you saw when you went there?

A Yes.

Q On August the 12th? About how long were you at the scene?

A About 40 minutes.

Q Okay. Now, based on your experience of having visited over 100 death scenes, was there anything to you that

[Page 174]
was unusual? Like the appearance of the scene?

A Yeah. The way he was laying on the ground.

Q What about that?

A He was laying flat with his feet crossed, arm--one arm up, one arm down.

Q Why was that unusual to you?

A It just was unusual because just by the way he was laying. I mean if there was a chair there and I assumed that he had fallen, but it didn't look like he had fallen. His legs were crossed. I've never seen anybody lay like that after falling.

Q Did you mention that to anyone?

A No, not at that time. Except for my partner.

Q Okay. In your work as an EMT, are you required to fill out a report like a police officer does?

A Not like a police officer, but a medical report.

Q Was a medical report filled out?

A Yes.

Q Was the fact that he was lying with his feet--his legs crossed at the ankles, in the position that he was in, was that relevant to reporting on his medical condition in any way?

A No.

Q Alright. Did you write that down in your report?

A No.

[Page 175]
Q And what was the reason you didn't write it down?

A Because basically the medical report just calls for findings--

Q You wrote all those?

A --I wrote all those, what I found.

Q Okay. Was there anything else about the scene that you found to be unusual?

A No.

Q Was there a--was there a glass there by Mr. Rogers?

A Yes. There was a glass there.

Q Alright. That was made of what material?

A It was a plastic.

Q Did you find the positioning of that glass to be unusual in any way?

A It was like right by his hand. At the time I didn't think anything of it.

Q You did not?

A No.

Q Okay. What kind of a floor was that?

A It was a hard floor.

Q Hard?

A Yeah.

Q Tile floor?

A Tile floor.

[Page 176]
Q Okay. Did you find any kind of signs of trauma on Mr. Rogers' body?

A No, I didn't see any obvious signs of trauma.

Q Did that impress you in any way?

A I kind of suspected that there should be if he had fallen.

Q Why?

A Usually when people fall, if they collapse, they hit themselves on the floor or on the table or a chair or something and usually something shows up that they had fallen and suffered some type of trauma.

Q Let me ask you this. Is there a difference between the skin of an older person and the skin of a younger person?

A Yes.

Q What's the difference?

A Usually an older person has more brittle skin. It tears a little bit easier. It bruises a little easier.

Q If an older person falls, for example, is it more likely that they're going to have some kind of a--

A Yes.

Q --abrasion or trauma?

A Yes.

Q And you didn't see that on Mr. Rogers at all?

[Page 177]
A No, I didn't.

MR. SKRZYNSKI: Thank you, sir. I have no further questions.

THE COURT: Mr. Cataldo?

MR. CATALDO: Yes, your Honor.

CROSS EXAMINATION

BY MR. CATALDO:

Q Good afternoon, Mr. Berryhill. My name is Bill Cataldo and I represent Miss Titlow in this case. And I'm going to ask you a series of questions. If the questions are confusing, if--just stop me and I can either correct or ask me to restate it, okay?

A Okay.

Q There is a word that is used throughout all your reports that I either can't pronounce or I don't know what it. Asystoli?

A Asystoli.

Q Asystoli.

A Asystoli.

Q What is that?

A That' s--basically it means that there is no electrical activity in the heart. It's a flat line that appears on the EKG monitor.

Q You received this run to the Grenadier address by dispatch?

* * *

[Page 199]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Danny Chahine}
Q Would you point that person out and tell me what she's wearing so that we can identify her for the jury?

A She's right there, wearing blue.

MR. SKRZYNSKI: Alright. Would the record indicate the witness has identified the Defendant?

THE COURT: It will. But again, your voice has got to be louder, please.

THE WITNESS: Yes, your Honor.

THE COURT: Thank you.

BY MR. SKRZYNSKI:

Q Did you know Von Lee Titlow in September of 2000?

A Yes, sir.

Q Alright. When had you met Nicole?

A Motor City Casino.

Q At the Motor City Casino?

A Yes, sir.

Q And when was that?

A End of June, beginning of July of 2000.

Q Of 2000. And when you met her, was she by herself?

A Yes.

Q Okay. At other times, did you meet her alone at the casino?

A No. She had her aunt with her.

Q Her aunt. And what was her aunt's name?

A Billie.

* * *

[Page 201]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Danny Chahine}
Q About how many times--would you always meet her at the casino?

A I met her at the casinos and I met her some other places too.

Q Alright. About how many times did you meet her at the casinos?

A Around 30 times.

Q 30 times?

A Yes.

Q And that was between what period of times, sir?

A Between when I met her til August.

Q From June until August?

A June until August.

Q About 30 times?

A Yes.

Q And was she always with her Aunt Billie at that time?

A Most of the time, like 29 times, maybe one time wasn't with her aunt.

Q Okay. Now, did she ever--did Nicole ever tell you where she was living at that time?

A Yes, sir.

Q Where?

A Rogers' residence.

Q At the Rogers' residence?

A (witness nodding) .

[Page 202]
Q And who else lived there?

A Don Rogers.

Q Okay. And Billie?

A Billie's husband.

Q Okay. Did you ever find out anything from Nicole about Don Rogers?

A Yes. Many things.

Q What did you learn about Don Rogers from Nicole?

A Can you be more specific?

Q Well, did you know what he did for a living?

A Yes, sir. He owned a company, tool and die maker.

Q He owned the company?

A Yes, sir.

Q Okay. Did you learn anything about the marriage between Billie Rogers and Don Rogers?

A Yes, sir.

Q What did you learn?

A They were not in good terms.

Q They were not in good terms?

A No, sir.

Q Do you know, had they been married--

A Yes.

Q --before this current marriage?

A Twice. They be married twice.

Q Alright. Nicole told you that?

[Page 203]
A Yes, sir.

Q Alright. Did you know anything about--did Nicole ever tell you about Don's financial situation?

A Yes, sir.

Q What did she tell you?

A That he's very rich and he's got around ten million dollars. That's what she said.

Q She told you that?

A Yes.

Q Okay. Now, sir, what do you do for a living?

A I'm a jeweler.

Q A jeweler?

A Yes, sir.

Q And about how long have you been doing that?

A About fifteen years.

Q And do you have your own--

A Yes, sir.

Q --store? You do? Now, I want to point out the date of August the 12th, 2000.

A Yes, sir.

Q Do you recall that date, sir?

A Yes, sir.

Q Did you come to find out on that date that Don Rogers had died?

A Yes, sir.

[Page 204]
Q Alright. How did you learn that?

A From Nicole.

Q In what way?

A She called my shop and she said that Don Rogers died.

Q What was your reaction to that? Was that--is that the only thing that she told you, was that he had died?

A She told me more things, which--

Q Tell us what she told you.

A --she said that they walked in the house--

Q Who did?

A --Billie and Nicole.

Q Um hm.

A At night after, because we were at the casino the night before.

Q Were you there too?

A Yes.

Q Alright.

A And she said that they walked in the house and they found him dead in the kitchen, on the kitchen floor. He was laying down on the kitchen floor.

Q Alright. Did you--go ahead.

A I was very surprised because, well, she mentioned before that he was not in good health.

Q Um hm.

A And he drinks a lot.

[Page 205]
Q Okay. Did you ask her anything about this death?

A Yes. I did say that, you know, I was very shocked and I asked how did he die?

Q What did she tell you?

A She said well, she was really--she was crying and she said that the police came and the police was asking too many questions and I was wondering why would she say that the police asked so many questions.

Q Why was--why was that unusual for her to say?

A Because I thought somebody dies and the police comes in, I mean what's the big deal about the police coming in to check on somebody dying?

Q Okay.

A And she said that the police was asking too many questions and I asked her, have you done anything or have you done anything, you and your aunt? Because the reason I'm saying that is because there was things said before.

Q Okay. We'll get to that in just a second. But you asked--you asked her if they had done anything?

A Yes.

Q Did she respond to you?

A No. She said that she would tell me everything later.

Q Was that the extent of your phone conversation that day?

[Page 206]
A Yes, sir.

Q Now, as she's talking to you during that conversation, what was she like? What was her demeanor like?

A She was crying.

Q Okay.

A I mean she--

Q That--you said that prior to this date, some things had been said that made you surprised to find out Don had died, is that right?

A Yes, sir.

Q Alright. What exactly had happened prior to this that made you surprised?

A Not much surprised as shocked.

Q Shocked?

A Yes.

Q Um hm.

A There was so many things that had been said about--well, there's many things. You know, I've talked about them before. So if you want to ask me--

Q I want you to tell this jury exactly what you knew about the situation that made you so shocked on August the 12th to find out Don was dead.

A --well, there was times that Nicole mentioned Billie wants to get rid of Don.

Q When did that happen? That conversation?

[Page 207]
A One time I was picking her up from where she lived and she mentioned that Billie would pay $25,000 to get rid of Don.

Q Did she explain to you how that conversation came about?

A This came after a couple weeks of meeting her. We were in the car coming from Troy, I think, going to the casino. I don't remember where, but we were in the car and she mentioned that. The next time--

Q Exactly what--yeah, go ahead.

A --the next time it was after I picked her up from their house and Billie and Don were fighting and I asked her what's going on?

Q How did you know they were fighting?

A Well, I went to pick her up and I heard some arguance and I asked her what's going on and she said that they were fighting over a $13,000 bill, credit card bill, that Billie spend the money in the casino and she charged it on--on the credit card.

Q Go ahead.

A And there was many occasions that she mentioned that Billie wants to get rid of Don.

Q What did she tell you about the relationship between Billie and Don?

A They were not getting along.

[Page 208]
Q Okay. Did she ever tell you why she thought she'd come--was she from Troy?

A No, she was from Tennessee.

Q Okay. Did she tell you why she came to Troy?

A Yes.

Q What did she say?

A She said that her aunt wanted her to come over here so she could help her.

Q Help her what?

A Help her do something, because Billie wanted to divorce Don and she didn't want to lose--I don't know what she didn't want to lose, but she wanted her to help her. Billie catched Don and Nicole in compromising position. So she will have something on Don. Billie will have something on Don.

Q That was Nicole's explanation of why--

A Of why she was here.

Q --um hm. Did that ever happen do you know?

A Yes. She mentioned sometimes that this happened. That Don walked--that Billie walked in, Don and Nicole, and Don was being fresh with Nicole. She caught them in the kitchen one time and she didn't say anything. Stuff like that.

Q Now, as far as you knew at this time, did you think that Nicole was a woman?

* * *

[Page 211]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Danny Chahine}

A So, when I knew, when she told me that she killed Don, I couldn't live with the fact that they did that and just going to be quiet.

Q When did she tell you about this?

A A couple days after he died. After they killed him.

Q Alright. The day that she called you and told you that he had died, did you have any more contact with her on that day?

A Yes.

Q Explain to the jury what happened.

A Tell them about the time that we went to the restaurant and everything?

Q Well, before you did that. On August the 12th, alright?

A Yes.

Q Now, let me just ask you this. You've testified in several hearings, right?

A Yes.

Q And at some hearings you've testified and you were told that you could say certain things, but you couldn't say other things, right?

A Yes.

Q Okay. And now today, you feel a little bit--

A I don't know what to say.

Q Yeah.

* * *

[Page 216]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Danny Chahine}
A No. Not much, but I--I really kind of had--she didn't say any specifics what happened. She said she would tell me later what happened, but I kind of knew of from what she told me I don't exactly remember what she told me, but I knew what happened.

Q Alright.

A Kind of like what happened to Don.

Q What did you think had happened at that point?

A Well, I knew they did something. But I didn't how exactly they did it.

Q Alright. Now, you said that she said that you would go out to dinner later?

A Yes.

Q Did you ever go to dinner?

A Yes.

Q Alright. When was that?

A I think Monday or Tuesday. I think Monday night.

Q Okay.

A We went to the casino.

Q Alright. That would be like the 14th, August the 14th?

A Yes.

Q Who went to the casino?

A Either the 14th or the 15th.

Q Okay.

A Myself and Nicole and Billie. We didn't go together,

[Page 217]
but they were down there. We met.

Q You went by yourself?

A I went by myself.

Q And then you met them?

A Yes.

Q Okay. Go ahead.

A Yes. I'm not sure exactly the date. I'm not about 14, 15, 17, but I know I remember it was a couple days went by and they went to the casino.

Q Okay. So--

THE COURT: Can everybody hear him? Okay. Thank you.

BY MR. SKRZYNSKI:

Q --when you go to the casino, what happens?

A We went to a very expensive restaurant in there and she says she wants to treat me for the dinner, which was unusual for me.

Q Was Billie there too?

A Yes.

Q At the dinner?

A No, she asked her if she wants to go have dinner with us, she said no.

Q Okay. Do you know where Billie went?

A She was playing the slot machines.

Q Alright. This is some how many days after Don died?

[Page 218]
A I can't exactly remember.

Q Alright.

A Two days, one day. I can't remember.

Q But it was shortly after that? After Don had died?

A Yes.

Q Okay. So she's playing the slots you said?

A Yes. Like you--like normally she does.

Q And you and Nicole went to this restaurant?

A Yes.

Q What happened there?

A She start telling me about exactly what happened to Don. She said that they walked in the house at 3:00 in the morning and they found him laying down on the floor, drunk passed out. Billie suggested that they do what they planned on doing before.

Q That was Nicole's words?

A Yes. And she said that they have to get rid of him now.

Q Billie said this?

A Yes.

Q Um hm.

A That's what Nicole told me. And then she grabbed the vodka bottles from the kitchen or the bar. I don't know where they kept--

Q Who did.

[Page 219]
A --vodka--Nicole said that Billie brought the vodka bottles and they start pouring the vodka in his mouth. One of them would pinch his nose and the other one would put the vodka in his mouth. And they take turns. But then Nicole said that ever time he gasped for air, she would let go because she didn't want to do

it. And she--she said she couldn't--she couldn't-she knew what Billie wants to do and she couldn't do it.

Q What did she say Billie wanted to do?

A She wants to kill Don.

Q Alright. And when Nicole was helping Billie pour the vodka, that's what they were doing?

A Yes.

Q Alright. What happened--did she tell you what happened next?

A She said that he wouldn't die and Billie got so frustrated that she told her, you have to help me. I'm going to make the 25,000 is going to be 50,000 and Nicole could not keep going. That's what Nicole said.

Q Um hm.

A And Billie got so frustrated she went into the living room and got the pillow and put the pillow on this face, just like that to--so he won't breathe no more and then that's--she did not tell me how he died or

[Page 220]
what happened after that. And she said that Billie told his family that she walked in there at 11. But she told the police that she was there at 3:00 and this what started all the--she thinks that what started all the investigation.

Q Did there come a time--now, during the time when they were doing this, did there ever come a time when--

you said that Billie had tried to urge Nicole on by telling her that she would give her more money?

A Yes. And she told her, we gotta do it now. Otherwise, if he wake up tomorrow morning, he will remember everything and it will be the end of Billie.

Q Okay. That was before she got the pillow?

A Yes.

Q Did she say what they did with the pillow and the bottle?

A Yes.

Q What did she say?

A She told me they threw them on the freeway. They got rid of the pillow and the bottles and they threw them on the freeway. And she--and Nicole asked Billie why she wasting all the good vodka on him.

Q Nicole asked Billie that? At what point was that?

A While they were pouring the vodka in his mouth.

Q Did she tell you what she meant by that?

[Page 221]
A No.

Q She just asked Billie why are we wasting good vodka on him?

A Yes.

Q Did Nicole say that she tried to stop Billie?

A No.

Q Did she say that she left the room while she was doing this?

A No. But she said that she stopped.

Q Okay.

A At some point.

Q But she--

MR. CATALDO: I didn't hear that answer, your Honor.

THE COURT: Please speak up and put that microphone pretty close to your mouth.

BY MR. SKRZYNSKI:

A She said that she stopped at some point, because she couldn't do it.

Q This was after she had poured the vodka?

A Yes. After helping her.

Q Okay. Now, this conversation that you're having with her, where is the occurring?

A At the dinner table, in the restaurant.

Q You think it's the--

[Page 222]
A In the casino.

Q --alright. Did she tell you anything else at that time?

A Yes. She said that she's going to tell me the truth about something else, that she wasn't a woman.

Q How did you--did she tell you that after she told you this about Don?

A I think so. Because I don't remember exactly--I remember the two subjects--you asked me that before too and it was very hard for me to remember, because it happened like a year ago when you asked me that and today it's been like two years ago. I don't remember exactly the order, but I remember this subject being talked about and the other subject, that which she's not a woman, talked about. One after the other.

Q When she told you that she was not a woman, what was your reaction to that?

A I was shocked. Seeing those pictures and if this woman would tell you she's not a woman, what would you think?

Q Which--

A And being with her.

Q --pardon?

A And being--I was with her before, I mean physically.

Q Had you been naked together?

[Page 223]
A Yes.

Q And you had not seen a male genitalia?

A No. Nothing.

Q How many times did that happen?

A Twice, maybe. I don't recall exactly. But I know we been together and then I just seen a woman. I didn't see nothing.

MR. CATALDO: I can't hear. I can't hear that, your Honor.

MR. SKRZYNSKI: He said he just seen-

THE WITNESS: I seen a woman.

MR. SKRZYNSKI: --seen a woman.

MR. CATALDO: Thank you.

BY MR. SKRZYNSKI:

Q Had you made, in your own mind, any thoughts or plans about a future with Nicole?

A Well, it was, you know, just a boyfriend girlfriend. I mean I didn't think about anything else at that time.

Q Did there ever come a time at the casino when you went down to the parking lot after the--

A Oh, yes. After we finished dinner. After she finished telling me that she's a man, they killed Don and all

this stuff. We went outside and I asked her to show me that she's a man, because I didn't believe

[Page 224]
her.

Q So what happened?

A We went to the car and we talked and we talked some more and we went through that subject, again, of them killing Don. We went through it again in the car.

Q Did she tell you the same thing?

A She told me the same thing.

Q Um hm. You said how long before this--you heard about the death, had you heard--had Nicole said Billie had offered $25,000 to get rid of Don? About how long before Don's death was that conversation? Do you recall?

A Before the conversation and ten, 13 days, something like that.

Q Before?

A And then this happened.

Q Okay. After this--these conversations occurred, including the conversation in the car, did you go back--where did you go?

A We went back inside the casino.

Q Did you see Billie that night?

A Yes.

Q Did you talk to her at all?

A Just hello or something like that.

Q Um hm.

[Page 225]
A Again, you know, nothing serious. But I remember going inside the casino. I don't know if it was that night. I'm pretty sure it was that night. And Nicole asked Billie for money and Billie got a book out. I don't remember what kind of book. But it was a small book.

Q You think it was that same night?

A I think it was the same night that she got a small book and she had on the book, $100,000 written at the top and she deducted. There was like $20,000 underneath it and then she asked for 700 I think and she wrote down 700 from underneath that.

Q So it was like she was keeping track?

A She was keeping track of--

Q Did--

A --some kind of money.

Q --did you ever discuss with Nicole the fact that she was telling you something that was very incriminating?

A Yes. I asked her why are you telling me all that? I mean I wasn't asking for all this information and I told

her, what if this end up in Court and I have to testify against you guys? She said no one would believe you. You're a foreigner. There are two white women, no records. I have record.

[Page 226]
Q You have a record?

A I have a record. And nobody is going to believe me. And I said, well, you know, nobody believes--I'm not-I mean I wasn't--

Q Go ahead. You weren't what?

A --I wasn't asking and I didn't want to hear--to be honest with you, I didn't want to hear anything. But I guess she said she has to get out of her chest. Get out, because she felt really bad and she said that she was doing her hair and her nails and she felt really, really bad spending Don's money.

Q I want to show you what I have marked as proposed Exhibit Number 12. You said that when Billie gave Nicole some money, that she marked it off? Do you recognize what I've marked as People's proposed Exhibit Number 12? Take that (undeterminable)--

A I remember this looking like this. It didn't have that red.

Q Well, no. I just put that on there.

A It didn't have that red thing and she opened it. I didn't see it from this side.

Q Um hm.

A I seen from the inside, where she had the writing on it.

Q Does that look familiar to you?

* * *

[Page 228]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Danny Chahine}
Q When was that?

A I don't remember exactly when they moved from the house, but I know that she did not call me for like three, four days and then she called me from a hotel. I think it was Kingsley Inn on Woodward.

Q Okay.

A And she said they had two rooms and then she said that they moved into one room.

Q Did she tell you what happened at the Kingsley Inn?

A No. About what?

Q Well, about this money. About the $100,000?

A No. She did not say anything about what happened in the Kingsley Inn.

Q Did she ever mention to you how the figure got to be $100,000?

A Yes.

Q What did she tell you?

A She said that the figure was originally 50,000, but Billie--one of Billie's daughters called her and she said she knew what they did and she should give Nicole more money. So it became 100,000.

Q Why should she give Nicole more money?

A I have no idea. Because she didn't explain.

Q Okay. After you had heard this information, how were you feeling about this?

* * *

[Page 233]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Danny Chahine}
Q How did you--how did you actually come out with this information? What did you actually do?

A The information on what?

Q About Nicole, about the murder?

A How?

Q What did you do?

A When I got all this information?

Q Yeah.

A It took me a week, I think, of thinking and working and, you know, and then I decided to call a friend of mine and he's a--he's a--he was a police officer in Bloomfield Township and now he's a sergeant. And I asked him to contact the Troy police and see if there's need of me talking to them.

Q Did you tell that police officer what you knew?

A I told him, yes, about the fact that the woman wasn't a woman, she was a man and she's saying that they killed--that's the way they killed her uncle and he said that he would contact me.

Q How did you know that police officer?

A I used to work in Bloomfield Township and one time people were stealing checks from the mail boxes and--

MR. CATALDO: I'm going to object to relevance, your Honor.

MR. SKRZYNSKI: I just want to--

[Page 234]
MR. CATALDO: I testified--

MR. SKRZYNSKI: Excuse me--

MR. CATALDO: Whoa, whoa.

THE COURT: Just a moment.

MR. SKRZYNSKI: --I wanted to establish the relationship that he had with this police officer.

THE COURT: Why does it matter?

MR. SKRZYNSKI: To indicate why he came forward with the information.

THE COURT: Why does it matter? He said he had a personal relationship with the officer.

MR. SKRZYNSKI: Alright. Okay. Alright.

BY MR. SKRZYNSKI:

Q So, ultimately, what happened with your information?

A He contacted Troy Police and he said that there's nothing like that. And then he said that he would call me back. He didn't know actually what I was talking about but then he said some detectives from Troy would call me back.

Q Did somebody call you back?

A Yes.

Q Who?

A Don Tullock.

Q Is this Detective Tullock back here?

A Yes.

[Page 235]
Q Alright. And what happened?

A He contact me and asked me to come over and I did go to the Troy Police Department and heard the story and he said to make sure I was telling the truth they'd have to wire me and I got to talk to Nicole about what happened and they want to hear it from her.

Q So what happened?

A They put a wire on me and we went--Nicole and I went to dinner and tape was--

Q Alright. When you went to see him, at the Troy Police Department and at the end of the conversation he asked you if you would wear a wire?

A Yes.

Q Alright. Did you do that the same night? Did you wear the wire the same night?

A No.

Q What happened?

A He told me to wait until she would contact me, which I did. She said she wants to go out to dinner.

Q This is Nicole now?

A Yes.

Q And how long after you had talked to the detective did Nicole contact you to go out?

A I don't remember exactly.

Q Was it a short time?

* * *

[Page 241]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Danny Chahine}

MR. CATALDO: --and again, for the record, I would indicate I have reviewed the transcript and it does follow along so that I have no objection to that.

THE COURT: Thank you.

(Playing of Exhibit #13 15:58:19 - 16:32:46)

MR. SKRZYNSKI: Your Honor, the other side of the tape plays what's on the remainder of the transcript. I agree with Mr. Cataldo that the other side is as equally unintelligible and it doesn't add more to what the jury's already heard. This tape will be--it's in evidence. The jury--

THE COURT: Alright.

MR. SKRZYNSKI: --can play it in the jury room and follow--

THE COURT: Okay.

MR. SKRZYNSKI: -- but (undeterminable).

MR. CATALDO: If we could approach the bench real quickly?

THE COURT: Yes. Do you have an objection to not having the rest played?

MR. CATALDO: (undeterminable) .

(Bench Conference Begins 16:33:22)

MR. CATALDO: I don't necessarily know that I have an objection. If I lose, that's going to be an objectionable thing. If the Court were to make a

[Page 242]
ruling that since we agreed that a lot of it is unintelligible, the Court has no objection to allowing it to go in as evidence. I can't--

THE COURT: Okay.

MR. CATALDO: --I can't--

THE COURT: Alright.

MR. CATALDO:--indicate I allow it. That's all.

(Bench Conference Ends 16:33:40)

THE COURT: I think I've looked at it and there are so many things that are unintelligible, the transcripts will be available to the jury. The full transcript and the tape, if they wish to hear the rest of it. So I think we would be somewhat wasting out time since almost every other sentence is unintelligible. So it will be made available to the jury if they wish to see the rest of it or--

MR. SKRZYNSKI: Thank you, your Honor.

THE COURT: --read it.

BY MR. SKRZYNSKI:

Q Mr. Chahine, I have a few more questions of you. In the--in the tape, in the conversation with Titlow, Titlow indicates something as you acting as an alibi. Did they ever approach you as acting as an alibi?

A Yes. She called me and asked me if I could be an

[Page 243]
alibi for them.

Q And say what?

A And say that we left the casino at 3:00 in the morning.

Q Together?

A Yes.

Q Was that true?

A No.

Q Did you tell her that you would or would not be an alibi witness?

A No, I said no.

Q Okay. Was there ever--what kind of a car did Nicole had?

A When I first met her or after?

Q Yes. When you first met her?

A She had a Chrysler LeBaron convertible, which belonged to Billie and Billie--she said that Billie gave it to her.

Q Did there come a time when that car changed?

A Yes.

Q When was that?

A After Don Rogers died.

Q Alright. Do you know, did she get another car?

A Yes.

Q What kind of a car did she get?

* * *

[Page 247]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Danny Chahine}
Q I mean other than that time.

A That I can't--I don't remember.

Q You can't remember?

A No.

Q Do you know if Billie ever changed her car after Don's death?

A Yes.

Q What did--how did she change it?

A She had a burgundy Buick, I think, and she changed to a black Cadillac.

Q Do you know when that was?

A Probably two days afterwards.

Q A short time--

A Three days.

Q --afterwards?

A Short time after.

Q Do you know the date of when she bought the new car?

A No. But I know (undeterminable) after like two or three days of burying Mr. Rogers.

MR. SKRZYNSKI: Alright. May I have one moment, your Honor?

THE COURT: Yes.

BY MR. SKRZYNSKI:

Q Did--you mentioned that Nicole described the smothering that occurred at the--

[Page 248]
A Right.

Q --at the casino. Did she mention to you if Don had done anything during the course of this smothering?

A Yes.

Q What did she say?

A She said he was playing her breasts.

Q During the course of this--when they were forcing alcohol down?

A Yes.

Q Did she mention to you anything about that? Say anything to you about what she had done when he did that?

A She said she didn't do anything and that's (undeterminable) .

Q Now, Mr. Chahine, after you had this conversation in the car with her, how soon after did you go to the detective bureau to turn this tape over?

A Right away.

Q The same night?

A Um hm. Yes.

Q Did you have any other--any further dates with Nicole?

A No.

Q Do you know if there came a time when Nicole left this area?

A I lost contact with her. I think she came down one

* * *

[Page 250]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Danny Chahine}
THE COURT: Okay.

(Bench Conference Ends 16:42:06)

BY MR. SKRZYNSKI:

Q When you were speaking at the casino about the smothering that occurred, did Nicole do anything besides just tell you what had happened?

A You mean the gesture that she did?

Q Yes, did she make a gesture?

A She put the pillow--Billie put the pillow on his--

Q Explain to the jury what she did.

A --well, she said Don--

MR. CATALDO: I would ask him to keep his voice up, your Honor.

THE COURT: Keep your voice up, please.

BY MR. SKRZYNSKI:

A She said Don would not die when they were pouring the alcohol in his mouth and closing his nose, opening-one of them would open the mouth and the other one would close the nose so he would gasp for air. Then they put alcohol in his mouth. And then after a while of doing that, he would not die. So Billie got frustrated. She went to the--she said she went to the living room and got a pillow and put the pillow on his face like that. Smothering him.

[Page 251]
Q Did Nicole--

A And she did that exact--she did that exact thing, like that, that Nicole showed me that's how Billie did it until he expired.

MR. SKRZYNSKI: Thank you, I have nothing further.

THE COURT: Alright. Ladies and gentlemen, I know it's been a very long day for you and we're going to conclude the testimony for today and continue with Mr. Chahine and the cross examination on Thursday. Remember, you're not going to be here tomorrow. I know you're going to miss being here, right? But don't forget about us and I do have some things that I want to tell you. First of all, I would like you to report on Thursday at a quarter to 9. Will that work a hardship on anybody? You all seemed to be able to make it today. Okay. Now, tomorrow when you go back to your jobs or whatever you're going to be doing or tonight, people will ask you what you've been doing? Why do you look so tired? Please, you may say you're on a jury in Oakland County Circuit Court. Do not say anything about the case and don't ask my clerk any questions about the case. Don't ask anybody any questions about the case. He can't answer anything, just like I can't answer anything. At the end, when you go in to deliberate, you can talk among yourselves

STATE OF MICHIGAN
SIXTH JUDICIAL CIRCUIT COURT
(OAKLAND COUNTY)

PEOPLE OF THE
STATE OF MICHIGAN,

vs. Case 01-177745-FC

VON LEE TITLOW
Defendant.

Oakland County
Judge Wendy L. Potts
People V Titlow, Vonle

_____/

TRIAL
TAKEN BY VIDEO TAPE RECORDING
BEFORE THE HONORABLE WENDY POTTS
CIRCUIT JUDGE
Pontiac, Michigan - Thursday, March 14th, 2002

APPEARANCES:

For the People: JOHN M. SKRZYNSKI (P33013)
1200 N. Telegraph Road
Pontiac, MI 48341
(810) 858-0656

For the Defendant: WILLIAM L. CATALDO (P37673)
29350 Harper
St. Clair Shores, MI 48081
(248) 354-6677

Fara Duffey
CER 0904
Livingston-Oakland Court Reporting
(810) 229-9487

[Page 2]

TABLE OF CONTENTS

PAGE

WITNESSES: (PEOPLE)

DANNY CHAHINE

Direct examination by Mr. Skrzynski 12
Cross examination by Mr. Cataldo 22
Redirect examination by Mr. Skrzynski 105
Recross examination by Mr. Cataldo 107
Redirect examination by Mr. Skrzynski 107

DONALD TULLOCK

Direct examination by Mr. Skrzynski 108
Cross examination by Mr. Cataldo 130
Redirect examination by Mr. Skrzynski 159

DR. DRAGOVIC

Direct examination by Mr. Skrzynski 161

AMY MOURADIAN

Direct examination by Mr. Skrzynski 226
Cross examination by Mr. Cataldo 236
Redirect examination by Mr. Skrzynski 243
Recross examination by Mr. Cataldo 243

RANDALL PANGRETIC

Direct examination by Mr. Skrzynski 244
Cross examination by Mr. Cataldo 251

WITNESSES: (DEFENDANT)

(None)

EXHIBITS:	IDENTIFIED	RECEIVED
PX#16 Document No. 141-69	171	172
PX#17 Exterior Exam Report	174	176
PX#18 Release to Funeral Home	179	180
PX#19 Death Certificate	186	187
PX#20 Supplement M.E. Report	211	212
PX#21 Amended Death Certificate	211	212

PX#22 Photograph of Decedent	219	219
PX#23-27 Bank One Records	230	231
PX#15 Bank One Records	235	236
PX#28-31 Bank One Records	235	236
PX#32 Merrill Lynch Records	247	247
PX#33 Merrill Lynch Records	249	249

* * *

[Page 14]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Danny Chahine}
{Q} you were doing?

A No, sir.

Q Did you ever ask for a reward?

A No, sir.

Q Did Defendant Titlow ever tell you why he wanted the money from the murder?

A She mentioned that she's going to use the money for a sex change operation.

Q Alright. Do you remember when it was that you had that conversation with Titlow?

A After I learned for the fact that they did that and--

Q That they did--did what? What are you talking about?

A --they--the killing.

Q Okay. After you learned about that?

A Yes. And she said she was going to move to Canada and do a sex change operation.

Q And the money was supposed to come from where?

A From Billie.

Q And that's--

A From the 70,000 or 60,000 left over from the purchase of the car.

Q Did--did Titlow tell you how much money Billie was going to give her?

A Yes.

Q How much?

[Page 15]
A 100,000 all together.

Q And you're aware of the fact that Billie bought Titlow a car?

A Yes, sir.

Q That was after Don had died?

A Yes, sir.

Q Was that before you had this taped conversation with Titlow?

A Yes, sir.

Q Did you ever see that car?

A Yes, sir.

Q What kind of a car was it?

A A white Buick Riviera.

Q And you're aware that Billie also used money to buy a new Cadillac, right?

A That's a separate money.

Q Right. Did you ever see that car?

A Yes, sir.

Q When--was that before or after the tape was made? Do you remember?

A Before the tape was made.

Q Okay. The tape that was submitted into evidence, we played the first side of that tape. After you got out of the car with Titlow, where did you go? When--you heard when the tape ended?

* * *

[Page 94]
{Q = Cross examination by Mr. Cataldo;
A = People's Witness Danny Chahine}
{Q} indicated to you that if in fact they were on top attempting to pour alcohol, it was at that time that he was playing with her breasts?

A Yes, she indicated that.

Q She never said anything about fighting for his life or trying to push them away. She indicated to you that he was playing with her breasts?

A Yes.

Q And on the evening, I believe it was evening, or at least during the conversation that you had with the police officers on August 30th of the year 2000, you told them, you told Detective Tullock that Nicole told you that she put her hand on Don Rogers' mouth and Billie Rogers put her hand on Don Rogers' nose?

A Yes.

Q And then Nicole told you that each time Don Rogers wanted to breathe, that she Nicole would let up or would let go?

A Yes.

Q That every time Don Rogers wanted to breathe, she would let him breathe?

A Yes.

Q She would let her hand go?

A Yes.

Q And then it was Billie Rogers who got the pillow?

[Page 95]
A Yes.

Q Now, you indicated in this conversation to the police on August 30th, that you had heard some statements that Nicole made about money?

A Yes.

Q And you had heard that she made some statements about Billie Rogers wanting to pay to have Don Rogers killed?

A Yes.

Q And when you spoke to the police, you indicated that Nicole said it to you in a joking fashion, that Billie Rogers would pay $25,000 to have Don Rogers killed?

A That's when I met her.

Q Okay.

A Couple days, two, three days after that, yes.

Q She indicated to you that when she was unable to complete the act or that when Don Rogers wanted to breathe, Nicole would let him breathe?

A Yes.

Q And that Billie Rogers got the pillow?

A Yes.

Q And that Billie Rogers put the pillow over Don Rogers' face?

A Yes.

Q That during all of this interaction, Nicole was

[Page 96]
present?

A Yes.

Q But it was--it was merely present at that point, meaning after she would let go of her hand and the alcohol situation. She never told you that she did anything else, other than probably not saying anything?

A Well, they asked me that question before and I said he asked me merely presence, the other lawyer.

Q Right.

A And I said, yes. My question was yes, merely present. He did not ask me what she was doing.

Q Okay. So you might not have known what she was doing. She never told you what she was doing?

A Well, she did tell me what she was doing.

Q She told you about the alcohol?

A Yes.

Q She told you about the hands over the mouth?

A Yes.

Q She told you about Billie getting frustrated?

A Yes.

Q She told you that Billie went and got a pillow and did the rest?

A She told me that when she stopped, Billie upped the offer from 25,000 to 50,000.

[Page 97]
Q But she also told you she didn't do anything else?

A Beside what Don was doing.

Q What Billie was doing?

A What Billie was doing and what Don was doing and she told me that Don died happy, because he was fondling her breasts.

Q Now, have you ever told that to the police or at any of the other hearings previous to this?

A I don't remember, but I remember today.

Q Okay. And that's not a statement that you would have thought important, that any time prior in the last year and a half?

A I don't remember and I remember today and I there was another statement that was said too, if you want me to say it.

Q Alright. Go for it.

A She said his killing was a mercy killing.

Q You said that before.

A I did?

Q Yeah.

A Okay.

Q That related to the fact that she had related--Nicole had related to you that Don was very ill?

A Yes. It was like a mercy killing.

Q Right. In a sense that that was kind of how she would

[Page 98]
rationalize it to you?

A Yes.

Q Even when she was saying that, she was crying and upset?

A Yes.

Q But after you indicate that Billie is becoming frustrated and she makes the statement from 25 to $50,000, you never hear Nicole make another statement that she put his--her hand back over Don Rogers' mouth?

A No.

Q You didn't hear a statement that she held him down so that the pillow could be placed over his head?

A I did hear a statement like that.

Q You did hear that statement?

A Yes.

Q What statement did you hear?

A Billie asked her to help pin him down, so that she could put the pillow on his head.

Q Alright. Well, that's another new--again, in 18 months, you never thought of telling that to Detective Zimmerman?

A I don't know if I told him or not, but my memory is--there's so much information I got to tell and I cannot get all together at once. You remind me of something

[Page 99]
and I remember and I'll tell you.

Q So your memory is fresher now on March, whatever it is today, 15th of the year 2000, than it was August--2002, than it was in August of 2000?

A It would be some key questions that it would refresh my memory with and then I remember.

Q So now you're saying that in fact you remember--now, let's talk a little bit. You have been interviewed by Mr. Skrzynski on what? Probably eight or ten occasions over the last 18 months?

A I don't remember how many times.

Q A lot of times?

A Yes.

Q You've been under oath at a series of hearings also in which you've testified?

A Yes.

Q In which there was always somebody present for the defense, Mr. Piszczatowksi or Mr. Lusting?

A When we were in the Courtroom, yes.

Q In the Courtroom. And you've had a series of conversations with Detective Zimmerman?

A Yes.

Q You had a series of conversations with Detective Tullock?

A Yes.

[Page 100]
Q And at none of those 15, 20 opportunities did you ever think or remember that Nicole indicated to you that she was now holding him down also?

A See, it was in the back of my head. It was--

Q I agree--

A --in the back of my mind.

Q --with that?

A Huh?

MR. SKRZYNSKI: Well, objection.

BY MR. CATALDO:

Q Way back there.

A I'm sorry, it probably is hard for you to believe, but I know I did say that.

Q That you did say that?

A She did say that to me. That was the answer for the 25 going up to 50, that she would have to do that.

Q So Billie now is--you indicated now that Nicole told you that when Billie gets the pillow, that she tells Nicole I'll up from 25,000 to 50, but you're going to have to hold him down?

A She said help me, help me here. That's what exactly what Nicole says. She says help me and then when she says I'm going to make it 50,000, that's what Nicole is talking right now. She's saying--she said that

[Page 101]
Billie told her that she's going to up the money from 25,000 to 50,000 and she's going to help her. She's going to do something. So she asked her to pin him down so she could put the pillow--put the pillow on his face.

Q So what you're saying is while Billie's got the pillow, she's negotiating with Nicole? If you want the money I'll make it higher and if you want the 50, you're going to have to do more?

A Well, it's probably hard to believe, but they were negotiating while they were killing the man.

Q She didn't indicate this in the car during the conversations that we can't understand, did she?

A No. She said it before.

Q She also indicated to you that Billie had a bad liver, right?

A I don't remember that.

Q If I told you that was on page 18 of the car conversation, would you have any reason to doubt it?

A No.

Q Would it be something that was said that you didn't remember?

A Yes.

Q Is there anything I can do to jog your memory about that part of the conversation?

* * *

[Page 104]
{Q = Cross examination by Mr. Cataldo;
A = People's Witness Danny Chahine}
when, before the pillow, after the pillow. I don't--she didn't say that. She's describing that he was playing with her breast while they were doing that.

Q Okay. So, you don't know at what point he was playing with her breasts?

A No.

Q And when you described--because you were told when the conversation was being taped that they weren't going to be able to hear what was going on in the car, but they were going to be following you?

A Yes.

Q And so on the videotape, to Detective Tullock, you describe what she described to you in the car?

A Yes.

Q And at no time during that conversation did you tell Detective Tullock that while the pillow as over, Nicole also indicated to you she was holding him down?

A No. She was holding her down during some period of time. I don't know if while the pillow was in his face. All I remember is that Billie asked Nicole to help her pin him down.

Q So it could have been during the time that they were pouring the alcohol in his throat?

A It could have been.

MR. CATALDO: I have no further questions at

* * *

[Page 176]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Dr. Dragovic}
A This report was issued--there is no date on the protocol itself, but the report was issued some time in December, I believe.

Q December of 2000?

A December of 2000.

MR. SKRZYNSKI: At this time, your Honor, I'd move for admission of Exhibit Number 17.

MR. CATALDO: If I could just see it, your Honor? No objection, your Honor.

THE COURT: Okay. 17 is admitted.

MR. SKRZYNSKI: Thank you.

BY MR. SKRZYNSKI:

Q And in addition to the findings that Dr. Ortiz made on the inspection of the body, page six, the last page of this inspection document also includes the results of toxicology findings that were done on both blood and urine obtained from Mr. Rogers' body, is that correct?

A That is correct, sir.

Q And that's part of this exhibit?

A Yes, sir.

Q Alright. We'll discuss that in a minute. Now, Dr. Ortiz made a finding of the cause of death based only on the inspection, is that correct?

A That is correct.

Q Alright. And initially, do you know what was the

[Page 177]
cause of death that Dr. Ortiz determined?

A He believed that Mr. Rogers died of arterial sclerotic vascular disease. He believed Mr. Rogers had a heart attack and that's what he put originally in the death certificate.

Q Okay. Do you know the basis of that opinion?

A Well, that's what emanated from the information given by the our investigator at the scene, by soliciting some information from the family, by general statistical inference if you want on why someone that is 74 years of age died at home under "normal circumstances".

Q Alright. So, statistically speaking most people, 74, white males of that age and the build that he's got die of arterial sclerotic cardiovascular disease?

A That's the most common cause of death as we know in medicine and--

Q So absent any evidence to the contrary, that would be the most likely cause of death?

A --that is, essentially, an educated guess.

Q Now, blood and urine from the body were preserved and forwarded to the toxicology lab at your office, is that correct?

A That is correct.

Q And the toxicology lab makes findings regarding te

* * *

[Page 195]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Dr. Dragovic}
{THE COURT} very, very technical. If you can't hear anything, please let me know. If you can't see anything, because there is going to be something on the projector now. Alright. You may continue.

MR. SKRZYNSKI: Thank you, your Honor.

BY MR. SKRZYNSKI:

Q Alright. Doctor, we were talking before about the fact that when you die of alcohol intoxication you get fluid in your lungs and some of this fluid will come up in your mouth in the form of what you call purge, which is sort of maybe wet or foamy material?

A That's correct, sir.

Q Now, you had an opportunity to look at the photographs of Mr. Rogers' body at the scene, which are Exhibits 1 through 7, is that correct, sir?

A That's correct.

Q Alright. Did you note any type of purge like that on Mr. Rogers?

A No, sir.

Q Now, Doctor, does this--you said that a .44 blood alcohol in a person with Mr. Rogers' drinking and medical history would not be a lethal level of alcohol, is that correct?

A That is correct.

Q Now, does the lack of purge around the mouth support

[Page 196]
that conclusion?

A That's one of those findings that one would see in people who die of acute alcohol intoxication and it was not there.

Q Okay. So, in your opinion Doctor, do you think that Mr. Rogers died of acute alcohol intoxication?

A No, sir.

Q Okay. Now, when you die of alcohol intoxication, your breathing stops. Is that what you said?

A That's correct.

Q Now, there are other forms of asphyxia, is that correct Doctor?

A Sure.

Q Alright. One of those forms of asphyxia is smothering, is that right?

A That is correct, sir.

Q And in the--in smothering, Doctor, can you explain to the jury what the--what happens in smothering?

A Smothering is a mechanism of deprivation of someone else of air that they breathe and that

generally will occur by blocking the airway, by shutting the nostrils and the mouth. By putting some object over it. Putting hands over, gagging the person, putting some material into, some objects, into the mouth and holding the nostrils. So that's the mechanism, the

[Page 197]
general principle is depriving someone of air, because air is necessary thing for--for us to breathe, so that we can live. Without air, we cannot sustain life. Because air brings oxygen in. Smothering can leave signs on a person that is assaulted by that pattern or not. It depends really what kind of resistance, physical resistance the person that is being smothered is able to maintain. For example, you can smother a small baby without any physical sign of it. You can smother an elderly person that is under the influence of some drugs that will decrease their capability to fend off. And you can certainly smother the very old or the very young, the babies and--the infants I'm talking about and the very old by far less effort, physical pressure or physical force than what you can accomplish--I mean try to accomplish on an average middle age person that is, of course, conscious and being able to mount resistance to fend off or try to fend off. Of course, bigger people and larger persons can smother easily or easier smaller persons. But any person is capable of mounting defense will do that if conscious. It is very easy to smother someone without physical trace or physical evidence when they're unconscious for whatever reason. If they're heavily intoxicated, it can be smothered very easily without

[Page 198]
a trace.

Q Now, Doctor, I mean in fact isn't smothering at times called the perfect crime because you can leave no traces in certain circumstances?

A Well, yeah, I don't believe they're perfect crimes. There are imperfect investigations. In general, crimes cannot be perfect in my concept. But that is the case, it leaves very little or none physical evidence. So, one basically is left with no ability to explain when looking at the body, not knowing the circumstances how death came upon this person. So that is a problem with this mechanism of assault, with this mechanism of death.

Q Okay. Doctor, in alcohol intoxication you get fluid in the lung and you might find purging around the mouth. In smothering, do you get any fluid in the lung?

A No, sir. Smothering is a act that takes no more than a couple of minutes. Over that period of time, the only thing that can happen to the lungs in a person that's being smothered is the blood vessels may get engorged. But they may not be able to go through all of this process of building up large amounts of fluid so that the purge will come so readily evident and pour out. It's a different mechanism. It's a

[Page 199]
different process. The victim smothering or victim of asphyxia that is brought about by someone else does not have generally very heavy lungs. They are--they may be congested because blood vessels get engorged simply because there is sudden efforts to resist, offering the--the only option there, the lungs are trying

to expand and the blood vessels engorge, but there is no build up of fluid in the form of pulmonary edema, like one sees where there is depression of the central nervous system by sedative, effective alcohol.

Q Now, Doctor, if someone is killed by the act of smothering and you perform and autopsy on that person's body, would you necessarily make--have any positive pathological findings in a person like that?

A No. That's the problem. You will only find findings or detect findings of physical signs of such a violent act if the person is capable to mount an effort to fend off. If the person is not capable of doing that, then you really do not find anything. For example, if someone puts hand, a large hand or small hand or both hands over the mouth and the nostrils, the nose of a person, the person that is alert, that is not under the influence of some drugs or some alcohol for example, that person, even though the person or the individual might be a smaller person, they will made--

[Page 200]
they will make an effort, a conscious effort to--to breathe, to try to do something. As a result of that, you will find that the inside of the lips, some bruising on the--you will find some other little details, other little physical departures from normal if you want. But if the person is intoxicated and there is no ability to lodge or mount a coordinated fending effort, than that person will die over a period of a minute upon just simple placing of--the softer the material you place over the mouth, the--or the softer more gentle the touch, the less one will be able to find. So if someone puts a silk scarf over or a plastic bag, you won't find anything. Someone puts some rough material or rough object, for

example, a jacket or something, something that has rougher weave--

Q How about a pillow with fabric on it, from a couch?

A --a pillow or the rougher weave in a fabric will leave some marks on the outside, because skin will be rubbed away and there will be scraping on the skin, generally as a result of that. But if you have a very fine material or a silk garment or a plastic bag, you won't find anything.

Q Okay. Now, Doctor, let's get back to Mr. Rogers for

[Page 201]
a second. When Mr. Rogers' body was found, several pictures were taken and you had an opportunity to see smaller versions of these exhibits which have been marked Exhibit Number 1 through 7, is that correct?

A That's correct. At the time when the investigation was ongoing, the Detectives from Troy Police Department brought me smaller format, 35 millimeter pictures, that were taken by the police--

Q Okay.

A --at the scene.

Q One other thing I wanted to ask you is, you said before that a person is not struggling during the course of smothering, that you're not going to find any physical signs. Let me ask you this, while .44 blood alcohol is not a lethal level here for Mr. Rogers, would you agree that .44 blood alcohol would impair, for

example, his ability to defend himself against an assault which involves a smothering?

A Sure. Alcohol is a sedative, will progressively, as it is built up in the circulation of blood, will progressively effect the ability of someone to coordinate movements. It will depress the control of anti-gravitational musculature. We--in order to be upright, to sit and to stand and whatever we are doing, we control our muscles that are working against

* * *

[Page 206]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Dr. Dragovic}
{A} was the time that we issued the actual autopsy protocol.

Q Okay. Now, were you made aware among other things that someone had come forward to say that someone had told them that this body had been smothered rather than died of natural causes?

A Yes, sir.

Q Alright. Now, one of the things that you did, in order to re-open the case and re-examine it, was to look at the pictures of the scene, is that correct?

A That is correct.

Q Alright. When you looked at the pictures of the scene, Doctor, did you have--did you come to any kind of conclusions? Just from the pictures?

A Well, when I was brought the photographs and these were--these were the smaller version--

Q Right.

A --of these blown up photos, there were some odd things that--that looked--just did not add up. They did not add on at all. The body was on the hardwood--not hardwood, hard marble floor, comfortably placed there with a chair tipped, supposedly in relation to the body. There was no trauma to the body whatsoever as a result of the contact with hard marble floor. There was the legs were crossed and placed. There was no

[Page 207]
disturbance anywhere else. So this just did not make any sense.

Q Why would you expect --why did it not make sense to you that there were no injuries found--by the way, the--the inspection protocol there, the Exhibit Number 17, where Dr. Ortiz placed his findings about the initial inspection, did that indicate that there were any kind of injuries to Mr. Rogers' body?

A There was a healing black eye, on the left side, left eye socket had a healing bruise. That was originally documented.

Q That was it?

A That was the only thing.

Q Okay.

A It was--it was inside the eye socket. It was not on the outside, on the outer aspect of the boney ridges, so this

would not have been the type of injury encountered in contact with this type of surface.

Q Why not? Why is the fact that it's inside there, as opposed to on the boney ridges? Why does that make a difference?

A Because a person strikes with that part of the face, a flat surface of the floor, then the most exposed parts, that would be the orbital ridges, the eyebrow area, the cheekbone, they would have sustained injury

[Page 208]
and this injury would have been significant, considering the type of surface that is unyielding surface and the type of fall that one takes, even if he falls as a result of being intoxicated or even if he--if this is a terminal fall, in a situation of a heart attack or--or some other ailment that precipitously leads to someone landing down.

Q So, this is something penetrated into that--the socket?

A It's something that was deeper in the eye socket. It was on the--on the upper lid and on the lower lid. Subsequently I discovered some other things, but at the time of examination made by Dr. Ortiz, that was the only thing that was documented.

Q And the coloration of the bruising on the eye, does that indicate to you the age of the bruise?

A Yeah. That had some yellow tint to it, so it was something that had been there for a couple of days at least.

Q Okay. Now, what kind of injuries would you have expected to find on the body of Mr. Rogers, if he had fallen onto that tile surface from the overturned chair, as it appears from the scene? Taking into account the fact that he's got a .44 blood alcohol.

A If--if he--if the decedent had fallen from a chair, he

[Page 209]
would have sustained some injuries even if to--if he had struck his head, he would have sustained injuries to his head. In the face or the back of the head, he would sustain injuries to the elbows or injuries to the knees if that falling was continued and repetitive. So absence of those is quite significant. Because we're looking in conjunction with this level of impairment, this level of intoxication and a man being found at the scene dead. Comfortably placed. So--

Q Comfortably placed, what do you mean by that?

A Placed in a simple lying position like he is--like he is in bed. Or like he was in bed. This to me was a staged scene and--

Q A staged scene?

A --yes.

Q Okay.

A A scene that is created. Not--not the actual natural outcome of something that happened there without interference of anybody else. But someone coming in and doing something to change this environment, to--or

possibly bringing the body of this man into that environment and placing it there.

Q Now, Doctor, those lack--the lack of injuries, the strange placement of the body, those things together,

[Page 210]
did they cause you to doubt whether--in addition to the fact there was no purge as we said before and as Mr. Rogers was a chronic severe alcoholic, in whom a .44 would not necessarily be a lethal level, would all those things add up to you to form a conclusion?

A Yes, they did.

Q What was that?

A And then I issued a report and--I issued a report about this review, addressed in a letter to Sergeant Donald Zimmerman, of Troy Police Department. That was on December 5th. And I told him that as a result of his request, I reviewed all the materials and their information and our materials and upon reviewing, it became obvious from the discrepancies that emerged that the scene of death was altered with the purpose to deceive authorities by disguising this death as a non-violent one. And I then submitted a copy of the change on the death certificate--

Q Okay.

A --there--

Q Hang on for just a second. I want to show you what's been marked as People's proposed Exhibit Number 20

and 21 and those are two pieces of paper, is that correct Doctor?

A Yes.

[Page 211]
Q And what is 20?

A 20 is the document that is filed in order to correct the death certificate. It's an affidavit that I issue when there is a need to correct the death certificate.

Q Is that the supplemental that was made on Mr. Rogers?

A Yes, sir.

Q What is the date on that?

A December 5th, 2000.

Q And what is the change that's made?

A The change was, and the cause of death which was asphyxia by smothering, that took seconds to minutes. The contributing factor was acute alcohol intoxication and the manner was homicide.

Q Okay. And did you then issue a revised death certificate?

A Well, they corrected it at the state level. The Bureau of Vital Statistics and at the Clerk's office, our clerical personnel just includes it in the original that is signed originally by Dr. Ortiz.

Q And is Exhibit Number 21 a copy of that amended death certificate that indicates that asphyxia by smothering is the cause of death?

A Yes, sir, it is.

Q Okay. At this time--let me ask you this. Is Exhibit Number 20 the supplement report for a pending death

[Page 212]
certificate, is that a document that's kept in the normal course of business for--of the Medical Examiner's office?

A Yes, sir.

Q And the--and is it part of the business of the medical examiner's office to keep these kinds of documents?

A Yes, sir.

Q Alright.

MR. SKRZYNSKI: At this time, your Honor, I would move for admission of both Exhibits Number 20 and 21.

MR. CATALDO: No objection, your Honor.

THE COURT: Alright.

MR. SKRZYNSKI: Thank you.

THE COURT: Exhibits 20 and 21 are admitted.

BY MR. SKRZYNSKI:

Q Alright. So, Doctor, as of December the 5th then, you had changed your--your diagnosis about the cause and manner of death from acute alcohol intoxication to asphyxia by smothering, is that correct?

A That is correct, sir.

Q Now, during the time period though between August the 12th and September the 1st, according to the medical records of the examiner's office, the cause of death for Donald Rogers was death by intoxication, correct?

A That's correct, sir.

* * *

[Page 214]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Dr. Dragovic}
Q Okay. Now, you and I subsequently met after the warrant was issued, prior to a preliminary hearing in this matter, is that correct?

A That is correct.

Q Alright. And that time, that is when you received those enlarged pictures of the scene, which are Exhibits 1 through 7, is that correct?

A That is correct.

Q And after--

A This would be those.

Q --looking at those, you examined those with a magnifying glass, is that correct?

A That is correct.

Q And did you make additional findings when you did that?

A Well, I noted some things that were not obvious at the--at the original review of those smaller format photos. As a matter of fact, this was done when you asked me what's this on the lip and I took a look. I took a magnifying glass and I analyzed the findings on the face and--and at that point, it became obvious that there were some fine scrapes on the left part of the nostril, the tip of the nose, scrapes of the skin, which are also known as abrasions. There was also some evidence of scrapes on the--on the upper border

[Page 215]
of the upper lip. And there was also some indication there, of course, this got blurred where the injury to the eye itself. I'm talking about the left eye. There were on top of that yellow shiner, for a better term, of the left eye socket, there were some fine scrapes of the eyelid. Upper and lower eyelid.

Q Alright. Now, Doctor, we've talked before about the fact that the bruising is to the interior of the socket, correct?

A Correct.

Q The scraping, the scrape on the eye, the scrape on the nostril, the scrape on the lip, would they have been

caused by the same thing that caused the bruising to the eye?

A No.

Q Why not?

A Well, number one, these are two different injuries. The injuries that we're talking about are fresh injuries. Recently sustained. The injury to the left eye socket clearly shows yellow coloration, which points to change of blood pigment as a result of broken blood vessels in there. That would have been a couple of days old. So we're talking about two different types of injuries in the first place. We're talking about the different injury pattern all

[Page 216]
together. This--the injuries that I am talking about in the form of scrapes, on the exposed parts of the scrape, particularly on the left tip of the--left side of the nose, the left nostril margin, on the upper lip area and on the surface of the exposed parts of the upper lid and lower lid. Those are the injuries that could only result from contact with some--some rougher surface.

MR. CATALDO: I didn't hear the last term, your Honor.

MR. SKRZYNSKI: From rougher surface.

THE WITNESS: From rougher surface.

MR. CATALDO: Thank you.

BY MR. SKRZYNSKI:

Q For example, a fabric on a--

A Yeah. A rougher--

Q --pillow?

A --a rougher fabric.

Q Okay.

A Something like that. Some surface that is capable of causing these scrapes at the point of applying it to the surface of the skin. Because the skin contains layers. The upper most layer of the skin is epidermis and it consists of multiple layers of squamous cells. A force is applied, that's what causes the scrape and

[Page 217]
you know that it does not bleed, but you see the redness and you see after a little bit it just dries up after about half hour. You don't--you don't have the bleeding there on the scrape, but it's red and it dries up. That's what it is. That's what the upper most part of the--of the surface of the skin is taken away. How? By pressing something that will slough it off and some rough cloth could create that. Some--it's--it's--essentially it's like a rope burn, if one climbs a rope and then slides down or--

Q A rug burn for example?

A --or a rug burn or something like that. Falling on synthetic turf. That kind of--where there is no blood pouring out. Where there is just that upper surface of

the skin is removed by that type of force. By the friction.

Q Now, Doctor, there is a difference between a vital--a wound that is caused while a person- -the appearance of a wound that's caused while a person is alive, as opposed to a marking on the body that is caused after the person has died, is that correct?

A Yes. Those markings we call post-mortem (undeterminable) .

Q Okay. Now, is there a way for you to determine, Doctor, whether the scrape on the lip and the scrape

[Page 218]
on the nose and the scrape on the eyelid was made before the person died or after?

A This would be only resulting before death.

Q Why?

A Because there was the new skin there, there was that reaction to it and there's changes there. If you scrape, the dead body, if you scrape the skin on the dead body, this reaction would not occur. See what happens there, it's a dynamic process. The reaction to the force that is applied to the surface of the skin will create some increased blood flow in that area. That's the vital reaction. On a dead body, there is no blood flow. The circulation stops. So there will be no evidence as such by the reaction. So the color is completely different.

Q Alright. Doctor, I want to show you what's been--so you're saying that these scrapes were made while Mr. Rogers was still alive?

A That's correct.

Q And are they very recent?

A They are fresh.

Q Fresh. Alright. I want to show you what's been marked as Exhibit Number 22. Now, your--the inspector on the scene, Mr. Allegrina, he took some polaroid pictures of Mr. Rogers at the scene, correct?

[Page 219]
A That's correct.

Q And some of those--or all of those polaroid pictures are made into 35 millimeter pictures, is that correct?

A Subsequently, yes.

Q And is that a photo of Mr. Rogers as he appears when he was brought to the M.E.'s office on August the 12th?

A Yes. This is a reproduction from a polaroid photo. So it does not have the--some of the tinge and color accuracies as they are present on the 35 millimeter photos. But it is--it is depicting the face of the decedent as it was on the stretcher at the time, prior to starting the examination.

Q Okay. And are the scrapes that you talked about on the lip and the nose, are they depicted in that photograph?

A Yes, they are.

MR. SKRZYNSKI: Okay. At this time, your Honor, I'd move for admission of People's proposed Exhibit Number 23.

MR. CATALDO: No objection.

THE COURT: Alright. It will be admitted.

BY MR. SKRZYNSKI:

Q Alright. Doctor, I want to put this up on this projector, just so that we can--I'd like you to show

[Page 220]
to the jury what we're talking about. What you're talking about as far as the scrapes. You said those scrapes, they--are they consistent with someone smothering Mr. Rogers while he was in an intoxicated state, using like a pillow with fabric on it, rougher fabric?

A Yes.

Q Okay. Is there anything, Doctor, in your findings in the inspection protocol or from looking at the pictures that is inconsistent with the cause of death being smothering?

A No, sir.

Q And is everything that you're seeing in the picture and in the report consistent with the idea that Mr. Rogers was smothered?

A Yes, sir.

Q Alright. That's Exhibit Number 22, Doctor?

A Yes.

Q Okay. Alright. I want to direct your attention there to the lip area. And can you--

THE COURT: You're blocking--

MR. SKRZYNSKI: Oh, I'm sorry.

THE COURT: --can you all see?

MR. SKRZYNSKI: Can you see the screen?

BY MR. SKRZYNSKI:

[Page 221]
Q --can you-- (undeterminable) --can you use this pointer here, press the white button and show us, using the little red dot what it is you're referring to on the lip?

A The lip is this part here, this margin of the lip that shows very fine scraping. This is something that's healing off or something that like that.

Q So that's not the same thing?

A That's not the same thing. There is some scraping here too and extending down here. So these are the areas that are scraped.

Q How about on the nose?

A There may be something in the lower lip, but it's just the--I can't tell. The nose is shown here with--at this

angle you can only appreciate this part, which is on the left side of the tip of the nose and in the margin of the nostril and then--

Q Here, let me move this thing.

A - -then on the eyelids, the surface of the upper eyelid and lower eyelid, the exposed part, there is--this is blurring with that old bruise inside, so this is all one can see. Of course--

Q Yeah.

A --excuse me. You have to be very careful understanding there is some purplish coloration here

[Page 222]
on the left side of the head and this is from lividity, where the position of the head of the decedent was to the left side and that comes from the blood that settles into the dependent parts of the body as a result of gravity when the circulation stops. So--so that would be rigor mortis.

Q Now, the lividity that you're talking about, you're pointing out to these discolored areas on this side of the face, right here, right?

A That is correct.

Q Okay. Now, that's--that's not the same as what you're pointing out on the lip and the nose, is that correct?

A That's correct. These are very specific different findings. These are surface of the skin injuries. They're fine injuries. They're not extensive type of injuries that

can be easily appreciated, but once looked at, one comes to appreciate those findings and that was the result of the evaluation of the blown up pictures. Of course, they become clear once you see it in a blown up fashion, they become clearly noticeable even in smaller photograph and even in the Polaroids.

Q Okay. Now, did these findings, Doctor, do they help to support your diagnosis that this was death by smothering?

[Page 223]
A Yes.

Q Okay. Again, is there--is there anything in this--in your findings here that is inconsistent with smothering?

A No, sir.

Q And are the findings that are all contained in the report, in the photos, on that last photo, the enlarged photo, are they all consistent with smothering?

A Yes, sir.

Q Okay. So, Doctor, did you reach a conclusion to a reasonable degree of medical certainty regarding the cause of death in this matter?

A Yes, sir.

Q And what was that?

A The cause of death was asphyxia by smothering.

Q And did you reach a conclusion to within a reasonable degree of medical certainty regarding the manner of death?

A Yes, sir.

Q And what was that?

A Homicide.

Q Thank you very much, sir.

A You're welcome.

MR. SKRZYNSKI: I have no further questions at

* * *

[Page 226]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Amy Mouradian}
Honor, the People would call to the stand Amy Mouradian.

MR. SKRZYNSKI: Step right this way.

THE COURT: If you'll come up please and be sworn. If you'll raise your right hand.

COURT CLERK: Do you solemnly swear or affirm the testimony you're about to offer is the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

AMY MOURADIAN

Called as a witness by the People, having been duly sworn by the Court at 16:07 p.m., was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SKRZYNSKI:

Q Alright. Would you state your name please, ma' am, and spell your last name?

A Amy Mouradian, M-O-U-R-A-D-I-A-N.

Q And can you tell us, ma'am, what is your occupation?

A I'm an operations consultant for Bank One.

Q And as an operations consultant, are part of your duties to be a custodian of the records of Bank One?

A Yes.

Q Alright. Now, ma'am, you brought records here on a prior occasion, and I'll be marking these as we go,

[Page 227]
regarding the accounts of Billie Rogers and Von Lee Titlow with Bank One, is that correct?

A Yes, it is.

Q Okay. I want to mark, first of all, this will be number 23. I want to show you what's been marked People's proposed Exhibit Number 23 and ask you, first of all, can you identify what that is?

A Yes. It's a checking account statement for Billie Rogers.

Q Does it also include the savings account in it?

A Yes.

Q And for what time period is that?

A This is the time period of August 9th through September 11th.

Q Okay. And of--of 2000?

A Of 2000.

Q Okay. I also want to show you what I'll mark as Exhibit Number 24, 25, 26, and 27 and ask you first of all, as to Exhibit--first of all, as to Exhibit Number 24, can you tell us what that is?

A It's a check drawn of the account--of the same account of the statement I'm holding.

Q And what check number is that, ma'am?

A It's check number 289.

Q And what is the date on that check?

[Page 228]
A The date is August 21st of 2000.

Q Alright. And who is the payee?

A Suburban Olds Cadillac.

Q And the--the payor?

A The payor is Billie Rogers.

Q And what's the amount on that check?

A The amount is $50,576 and, I believe, 80 cents.

Q Okay. I want to show you what's been marked as Exhibit Number 25 now and ask you, can you identify that, ma'am?

A It's a check drawn from the same account.

Q And again, the payor is Billie Rogers?

A Billie Rogers.

Q And the payee is Suburban again?

A Suburban Olds Cadillac, yes.

Q And the date on that is August the 24th, 2000?

A That's correct.

Q And the amount, ma'am?

A $19,837.30.

Q Okay. Now, I want to show you what's been marked as People's proposed Exhibit Number 26 and ask you is that a two page document?

A Yes, it is.

Q Okay. And what does that document represent?

A A check drawn off the account of Billie Rogers.

[Page 229]
Q What's the number on that check?

A 297.

Q And who is the payor?

A The payor is Billie Rogers.

Q And to whom is that check made out?

A Von Lee Titlow.

Q Alright. What is the amount of that check?

A The amount of the check is $70,260.

Q Okay. Now, I also want to show you Exhibit Number 27, proposed Exhibit Number 27. What is proposed Exhibit Number 27?

A Exhibit Number 27 is wire transfer records from Bank One.

Q Okay. Now, is that--when you say a wire transfer, does that represent the transfer of funds from one account, outside of Bank One, into an account at Bank One?

A Yes.

Q Okay. Do you know from where those funds are transferred? Where they come from?

A In looking at this--I'm looking for the bank name. I can't find the name.

Q Okay, if you can't find it, that's fine.

A Alright.

Q Does it--that document represents three wire

[Page 230]
transfers, is that correct?

A That's correct.

Q And the second wire transfer, what's the date on that?

A The date on that is 8-24 of 2000.

Q August 24th, 2000. And what's the amount being transferred from one institution into Bank One?

A $100,000 even.

Q Alright. And to which--to whose account is that transfer being made?

A To the account of Billie Rogers.

Q To the account of Billie Rogers. Alright. Ma'am, I want you to--first of all, are all of these documents records that are kept in the normal course of business of Bank One?

A Yes, they are.

Q And is this--is it part of the business of Bank One to keep these documents?

A Yes, it is.

MR. SKRZYNSKI: Alright, at this time, your Honor, I would move for admission of Exhibit Number 23, 24, 25, 26 and 27.

MR. CATALDO: That's fine, your Honor, I will--

THE COURT: Alright. I will--

MR. CATALDO: --that's fine. I have no objection.

[Page 231]
THE COURT: --admit 23 through 27.

MR. SKRZYNSKI: Thank you.

BY MR. SKRZYNSKI:

Q Now, ma' am, does the account statement for Billie Rogers show that the $100,000 was deposited into her account?

A Yes, it does.

Q And further, does it show, does the account statement there show that the check number 289, made out to Suburban Cadillac for over $50,000 on August 21st was in fact actually paid out?

A Yes, it does.

Q Alright. Does it show that the check made out to Suburban for $19,000 and some change on August the 24th, does it show that that check was paid out?

A It does.

Q And finally, does that account statement indicate that the check written for 70,000 and some to Von Lee Titlow on August 24th, was that check paid out?

A Yes, it was.

Q Thank you. Now, I want to show you a second set of records. I'll start these at 28. I want to show you proposed Exhibit Number 28, can you--is that a three page document, ma'am?

A Yes, it is.

[Page 232]
Q Okay. And can you tell us what that is?

A These are checking and savings account statements for Von Lee Titlow.

Q And what's the period of that statement?

A Some time before September 13th, through September 13th.

Q Okay.

A It was a new account.

Q So the check--the account was opened in that time period?

A Yes, it was.

Q Okay. Now, I would like to show you Exhibit Number 29, is this a four page document, ma'am?

A Yes, it is.

Q Can you tell us on page 1, what is reflected on page 1?

A Page 1 contains two deposits, one to a savings account indicated on that statement and one to the checking account indicated on that statement.

Q Okay. Those are deposit receipts?

A Yes. They are.

Q Okay. And the deposit that was made to the saving account is in what amount?

A $5,000.

Q Okay. And that's--the name on that slip?

[Page 233]
A Is Von Lee Titlow.

Q Okay. And what is the date that that deposit is made?

A The date is--is August 25th, 2000.

Q Okay. Now, you said there's a deposit made to the checking account as well?

A That's correct.

Q And is that also made on August the 25th?

A Yes, it was.

Q And that again is the account of Von Lee Titlow?

A Yes, it's the same account number.

Q And what's the amount of that deposit?

A $4,000.

Q Alright. Now, the second page of that document simply shows the backs of those two receipts, right?

A It--yes, it does.

Q Okay. Now, the third page, what is the third page, ma'am? What does that depict?

A The third page contains a check made payable to Von Lee Titlow from Billie Rogers, in the amount of $70,260.

Q Okay. Is that, ma'am, the same check that came from Billie Rogers' account, that we had marked as Exhibit Number 26?

A Yes, it is. Check number 297.

Q Okay. Alright, now that--that indicates that that

[Page 234]
check was cashed by Von Lee Titlow and placed into her account?

A Yes. It's part of the same transaction.

Q Alright. It's part of the same transaction as those two deposits?

A Um hm.

Q Alright. Now, I want to show you what's been marked as--prior to before you came in, we marked this

as proposed Exhibit Number 15, and can you tell us what that is, ma'am?

A This is a receipt for a certificate of deposit in the amount of $60,000, in the name of Von Lee Titlow.

Q And what is the date on that?

A The date is 8-25 of 2000.

Q Okay. Now, ma'am, all of these records, that record, Exhibit Number 15, and Exhibits Number 29, do they indicate all these records together that those deposits, the deposit for $4,000 to the checking account, the deposit of $5,000 to the savings account and the Certificate of Deposit for $60,000 were all made out of that same $70,000 check received by Von Lee Titlow from Billie Rogers?

A Yes.

Q Okay. I also want to show you--and that's reflected on the statement of Exhibit Number 28, that those

[Page 235]
deposits were actually made?

A Yes. The deposits are indicated on the statement.

Q Okay. Finally, ma'am, I want to show you what I will mark as Exhibit Number 30 and 31. And Exhibit Number 30, that's a one page document ma'am?

A Yes, it is.

Q And what does that depict?

A This indicates a withdrawal from the savings certificate--

Q That was Exhibit Number 15?

A --that's correct.

Q For how much?

A For $10,000.

Q Okay. And Exhibit Number 31, what is that? Is that a one page document?

A Yes, it is.

Q And what does that depict?

A That indicates that a $10,000 deposit from the savings certificate into a checking account.

Q Okay. And Exhibit Number 28, does that reflect the deposit of that $10,000 into her checking account?

A Yes, it does.

Q Okay. Are these all--are these all documents that are kept in the normal course of business of Bank One?

A Yes, they are.

* * *

[Page 247]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Randall Pangretic}
{Q} Merrill Lynch to keep records like this?

A Yes, it is.

MR. SKRZYNSKI: At this time, your Honor, I would move for admission of Exhibit Number 32.

MR. CATALDO: No objection.

THE COURT: Alright. 32 will be admitted.

MR. SKRZYNSKI: Thank you.

BY MR. SKRZYNSKI:

Q Now, Mr. Pangretic, I'd like you to look at the statement from this IRA account that is effective as of August the 31st of 2000 and can you tell us, tell the jury, sir, what that account was worth on August the 31st?

A Close of business on August 31st, the account was valued at 1,065, 750.

Q Okay. So that amount of money belongs to Billie Rogers as of that day?

A That's correct.

Q Okay. Now, sir, I'd like to show you what's been marked as People's proposed Exhibit Number 33. And can you tell us what this, sir? That's a multi page document as well?

A That is correct.

Q Okay. And what is that?

A This is a Merrill Lynch statement, a joint with rights

[Page 248]
of survivorship, Donald E. Rogers and Billie Rogers, joint with rights of survivorship.

Q And is that for a cash management account?

A That is correct.

Q And for what time period is that effective?

A July 1st through July 31st of 2000.

Q Okay. Now, is there--I want to show you as part of that same package, another section of this, and does that show a different date--is that a statement for a different date?

A Yes, it is. This is the August 1st of 2000 to August 31st, it is now Donald E. Rogers, deceased and Billie Rogers, joint with rights of survivorship.

Q Alright. Now what does rights of survivorship mean? Could you explain that to the jury?

A That means if one of the parties is deceased with a death certificate, the total ownership of that account will go to the survivor.

Q And the survivor in this case is?

A Billie Rogers.

Q Alright. And now, sir, can you tell us on August the 31st, what the cash value of the CMA account was?

A Just the CMA?

Q Yes. Just the CMA.

A $712,880.

[Page 249]
Q Alright. Now, does that statement contain the total value of the account, the CMA and the IRA account?

A Yes, it is.

Q Okay. And what is the total number? What were both accounts worth on August 31st of 2000?

A $1,778,603.

Q And that money would belong to Billie Rogers?

A Right. The IRA and CMA.

Q Okay. Now, I wanted to also show you on Exhibit Number 30--I'm sorry. Exhibit Number 33, is that a document that's kept in the normal course of business of Merrill Lynch?

A Yes, it is.

Q Is it part of the business of Merrill Lynch to keep documents like this?

A Yes, it is.

Q Alright.

MR. SKRZYNSKI: At this time I would move for admission of Exhibit 33.

THE COURT: It's admitted.

MR. CATALDO: No problem, your Honor.

BY MR. SKRZYNSKI:

Q Now, sir, I want to direct your attention to one page of Exhibit Number 33 and ask you, does this reflect a cash or wire transfer that was made from that account?

[Page 250]
A Which one? There's a few of them.

Q Alright. Is there a wire transfer for $100,000?

A Yes, there is. On 8-24 of 2000.

Q And does it say to whom that money was transferred?

A No, it just says wire transfer out and the wire code number.

Q Okay. So that's a total of a $100,000 that was transferred from--does it say which account that is?

A This would have been July 7th (undeterminable). This is Donald Rogers, deceased, the CMA account.

Q The CMA account?

A Correct.

Q So that represents the transfer of $100,000 from the Merrill Lynch account to some other bank?

A Some other location.

Q Okay. Alright. That's fine. Now, the CMA account is designated on the July 31st statement as Donald E. Rogers and Billie Rogers, JTWROS, right?

A Right.

Q And that stands for?

A Joint with rights of survivorship.

Q Okay. That indicates that even on July the 31st when Mr. Rogers is still alive, this account is set up such that if Mr. Rogers dies, it automatically goes to

* * *

[Page 254]

(Jury Dismissed 16:42:52)

THE COURT: Okay. We're in recess. Can I ask that you're here at 8:30?

MR. SKRZYNSKI: Yes, ma'am.

THE COURT: And if you want to leave anything, you can leave it back in my office.

MR. SKRZYNSKI: Can we leave this (undeterminable) there?

THE COURT: Yeah, I don't see why not.

MR. CATALDO: Before we go to recess--

THE COURT: Yeah.

MR. CATALDO: --your Honor, I had discussed with Mr. Skrzynski that--

THE COURT: Do you need Ms. Titlow here

MR. CATALDO: --no.

THE COURT: Okay.

MR. CATALDO: Obviously--

THE COURT: Please be seated.

MR. CATALDO: --as we are aware in this case--

THE COURT: Anyone that wants to be seated may.

MR. CATALDO: --that Ms. Titlow did pass a polygraph test. The information that she passed the polygraph test was information presented to the detectives during her briefing some time in August or

[Page 255]
September of last year. I'm not specific. It was taken by a Christopher Lanphere, that was the basis for the offer of reducing the charge from first degree murder to manslaughter with a sentence bargaining. The facts that were passed on indicated that Ms. Titlow was present. That she did do some of the alcohol issues. That she then left the room. When she came back into the room Billie Rogers had the pillow over--

THE COURT: Excuse me, you waive her presence?

MR. CATALDO: --yes, I waive her presence.

MS. TITLOW: Can I listen if she (undeterminable)?

MR. CATALDO: No, just go ahead.

THE COURT: Okay. We're holding the jury. Alright. Thank you.

MR. CATALDO: That she in fact had left the room and observed the asphyxiation going on.

THE COURT: Right.

MR. CATALDO: I think based on that, the Prosecutor's office and the police department made a decision that she was trustworthy and that that was the information that they would use in their effort to convict Billie Rogers. Subsequent to that, for whatever reason, that plea was--was reneged on or denied--

[Page 256]
THE COURT: Yes. Your client--

MR. CATALDO: -- (undeterminable) --

THE COURT: --withdrew.

MR. CATALDO: -- by my client.

THE COURT: Yes.

MR. CATALDO: I am at a loss, your Honor, as to whether I have the basis to object or just protecting the record, CYA, for any appellate attorney that's going to review this, I don't know what to do in the sense that we had this information now from Chahine that he adds now there is some sort of issue of fondling the breasts, which was available earlier, but more importantly that now there was a negotiation that occurred during the time of the asphyxiation and, in fact, that she was participating by holding him down. That's information that clearly, I would submit based

on the polygraph test is a lie or information inconsistent with what she passed the poly on. I know that I cannot introduce the polygraph result unless the Prosecutor in some fashion slips up and opens the door and Mr. Skrzysnki, with him, that's not going to happen in this case. At the same time, I believe I have what is one set of truth and what I believe to be an absolute fabricated false lie.

THE COURT: Um hm.

[Page 257]

MR. CATALDO: And I don't know what to do.

THE COURT: Well, I'll make it easy for you. This Court does not recognize polygraphs. It's not admissible in this Court.

MR. SKRZYNSKI: Thank you, your Honor.

MR. CATALDO: That's fine, your Honor.

THE COURT: We're in recess.

COURT CLERK: All rise please.

(Court Adjourned, End of Record 16:46:13)

STATE OF MICHIGAN
SIXTH JUDICIAL CIRCUIT COURT
(OAKLAND COUNTY)

PEOPLE OF THE
STATE OF MICHIGAN,

vs. Case 01-177745-FC

VON LEE TITLOW Oakland County
Judge Wendy L. Potts
Defendant. People V Titlow, Vonle
_____/

TRIAL
TAKEN BY VIDEO TAPE RECORDING
BEFORE THE HONORABLE WENDY POTTS
CIRCUIT JUDGE
Pontiac, Michigan - Friday, March 15th, 2002

APPEARANCES:
For the People: JOHN M. SKRZYNSKI (P33013)
1200 N. Telegraph Road
Pontiac, MI 48341
(810) 858-0656

For the Defendant: WILLIAM L. CATALDO (P37673)
29350 Harper
St. Clair Shores, MI 48081
(248) 354-6677

Fara Duffey
CER 0904
Livingston-Oakland Court Reporting
(810) 229-9487

[Page 2]

TABLE OF CONTENTS

PAGE

WITNESSES: (PEOPLE)

JOHN GRIFFIN

Direct examination by Mr. Skrzynski 7

DR. DRAGOVIC

Cross examination by Mr. Cataldo 11

Redirect examination by Mr. Skrzynski 89

Recross examination by Mr. Cataldo 100

DONALD MCGINNIS

Direct examination by Mr. Skrzynski 105

Cross examination by Mr. Cataldo 109

Redirect examination by Mr. Skrzynski 119

DONALD ZIMMERMAN

Direct examination by Mr. Skrzynski 123

Cross examination by Mr. Cataldo 132

Redirect examination by Mr. Skrzynski 243

Recross examination by Mr. Cataldo 243

PAUL LIVERNOIS

Direct examination by Mr. Skrzynski 148

Cross examination by Mr. Cataldo 166

WITNESSES: (DEFENDANT)

ROBERT ALLEGRINA

Direct examination by Mr. Cataldo 177

Cross examination by Mr. Skrzynski 182

EXHIBITS.	IDENTIFIED	RECEIVED
DX#A-F Document No. 141-69	171	172
PX#34 Will of Don Rogers	106	107
PX#35-36 Suburban Cadillac Records	149	151
PX#37 Visa Records	123	123
PX#12 Checkbook	125	126

* * *

[Page 48]
{Q = Cross examination by Mr. Cataldo;
A = People's Witness Dr. Dragovic}
{Q} read in the thing--

A Yeah.

Q --but you did you talk about it yesterday so that they understand what that term is?

A I don't remember if I was asked about that, but--

MR. CATALDO: Mr. Skrzynski, did we talk about that?

MR. SKRZYNSKI: No.

BY MR. CATALDO:

Q Would you explain what Burking is, so that they have an understanding?

A Sure.

Q Now that it's (undeterminable).

A This is a known--it's not a medical term. It's the common language term. It came after the series of murders committed by Burke and Hare in 19th Century in Edinburgh, where they were drinking people--they were--first these two guys were grave snatchers. Body snatchers from graves. And they would look for people who were freshly buried, dig out the body, take the body, sell it to anatomy department at the University of Edinburgh, in Scotland and get the money for it. And then they realized that they could do it better, because

they were low lives and they were associated by--were associating with these drunkards on the

[Page 49]
streets. And they figured out it would be cheaper and easier for them to put these drunkards in a state of unconsciousness and simply sit on them or put the hand on their mouth, because they would not resist because they're drunk and (undeterminable) and freshly prepare the bodies and sell them to the anatomy department. The over supply of bodies brought the investigation and that's how this became into history as Burking, because one murderer was Burke and the other was Hare. And this is the closest I came to Burking in my experience, of death investigation of so many years. This method. Because it does not leave very many signs, but allows for accomplishing or rendering someone dead. So that's what Burking was and it's known that there is a precedence in history.

Q I believe you indicated earlier that it would be very difficult in a comatose person to pour a whole lot of alcohol down into their throat. Is that my understanding of what you said? You said two drinks would be a lot was your--

A No, no, no. I was specifically referring to potential for inhalation.

Q --okay.

A Of bringing alcohol into the airway--

Q Right.

* * *

[Page 71]
{Q = Cross examination by Mr. Cataldo;
A = People's Witness Dr. Dragovic}
{Q} operating type smocks, something that you wear at the--wear while you're performing these autopsies, I mean like standard clothing like surgeons wear, things like that?

A The person who is holding the body for the purpose of photographing is exposing the body to the investigator that is taking the photograph; that person is an autopsy attendant.

Q Okay. So, what all I'm saying is, you actually get this close to the body?

A Sure. You're supposed to.

Q I mean you're within inches of the body at all times?

A Not necessary at all times, but--

Q Yeah, but--

A --but you should be. This is the examination. You get close.

Q --so when I read things then in the report that indicates the body has no injuries or no trauma. Let me read that line specifically. The body shows no evidence of bruises, fractures, lacerations or deformities, before that conclusion is reached, somebody from your office has been that close?

A Yes.

Q Because I'm curious, I can see this from a mile away. Any untrained eye can see that in this photograph--I

[Page 72]
need to know how it was missed. How--because not only was it missed, it becomes the whole key piece of evidence to this whole case. I want to know how somebody from your office with all that education can just simply say, oh God, how did you miss it?

A Well, excellent question. I asked the same question at the time, sure. And I was frustrated exactly that like you. But this, you see, this whole thing did not become even obvious until I received those--those enlarged, blown up photos from the scene. When I was asked by the Prosecutor at the meeting, what is this on the lip--

Q But--

A --and then I started looking at it. Now, this is a magnified photo. This is a magnified photo.

Q --but you--correct. But even looking at this, okay? Honestly, look at it. You could--I could show it to the jury. They can see it from here. They can see--

A Sure.

Q --how do you miss it? I mean--

A I will explain. This is a 35 millimeter photo of a Polaroid.

Q Right.

A You look at the original Polaroid, if you take a look--

* * *

[Page 97]
{Q = Redirect examination by Mr. Skrzynski;
A = People's Witness Dr. Dragovic}
A --of that.

Q Okay. And the fact that there are no defensive wounds supports your theory that he was rendered helpless and then smothered?

A Well, it's not my theory, it's the findings.

Q That's (undeterminable). Those are the findings.

A There are no findings of physical defense mounted by this victim.

Q Doctor, when you were talking about the fact that you would expect to see some kind of injury in a fall--in an uncontrolled fall, even onto a rug, you'd get rug burns or on to a hard surface, you get some bruising maybe or even a laceration, does the--does the over turned chair next to Mr. Rogers body suggest to you that this was an uncontrolled fall in any way?

A Yeah. That's the--the suggestion there, but it after looking at the scene, it seemed to me that this chair was just placed there in that fashion.

Q Okay. Because there are no--

A Because there are no injuries relative to that tipped chair.

Q --okay. That just--all these things did though was to increase your index of suspicion about this whole scene, is that correct?

A That is correct.

* * *

[Page 106]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Donald McGinnis}
A I'm an attorney at law, sir.

Q As part of your job as attorney at law, did you represent a person by the name of Donald Rogers?

A I did, sir.

Q Did you prepare a will for Donald Rogers?

A I did, sir.

Q I want to show you what I've marked as proposed Exhibit Number 34. I'm sorry. Do you recognize that--first of all, that is a document, sir?

A It is.

Q How many pages is in that document?

A Five.

Q Okay. Is that in fact the will that you drafted for Mr. Rogers?

A It appears to be a certified copy of the will that I prepared for Mr. Rogers, Mr. Skrzynski. I can't tell--yes, it is a certified copy.

Q Okay. And that certified copy means that it's certified from the probate records. That's the copy that's on file in the probate court, is that correct?

A Yes. The seal indicates that this in fact a--a complete duplicate copy of the one that--the original that's been filed with the probate court.

MR. SKRZYNSKI: At this time, your Honor, I would move to admit Exhibit Number 34.

[Page 107]
MR. CATALDO: No objection.

THE COURT: Alright. Exhibit Number 34 is admitted.

MR. SKRZYNSKI: Thank you.

BY MR. SKRZYNSKI:

Q Alright. Mr. McGinnis, is there attached to this an order of entry as well?

A Yes. There is. There's a certificate of formal probate of the will, which is executed by the chief judge of the probate court indicating that the will that I had prepared, the original that is in the court file has been accepted formally as the last will and testament of Donald E. Rogers.

Q And does that mean that his estate is then distributed pursuant to the terms of that will?

A That is correct. Once the will is presented to probate, there's a period of time for all interested parties in the estate of Mr. Rogers to file objections to the will, which in most cases would be objections to the distribution provided within the will. If no objections are file or if objections are filed, it's subsequently litigated not to be valid, then the document itself is received in the

probate court as the--as the final last will and testament of Mr. Rogers and the distribution of his estate is then

[Page 108]
governed by the provisions of this document.

Q When is the order entered sir? Is there a date on there?

A Yes. The date that bears on this document, as to the certificate of it being formally accepted is January the 10th of the year 2001.

Q So that's when that will became effective?

A That's when the will became effective. That is correct, sir.

Q And does that will provide, sir, for how the estate should be distributed?

A It does, sir. It is in a general sense a document that divides the entire estate or bequeaths that--or gives the entire estate to beneficiaries that are designated by Mr. Rogers. It makes no exception as it relates to the beginning of the document, it provides that as the law provides that any of his debts or any outstanding claims that may be made against him are paid off first and then the disposition follows that in general. And in this particular document, it provides for the entire disposition of his possessions, real or personal, to his wife, Billie Jean Rogers.

Q So she is the sole beneficiary of that will?

A If she were--she did survive him, so therefore, she in

[Page 109]
fact was the sole beneficiary of the estate of Donald Rogers.

Q And that's effective on January the 10th of 2001?

A That's correct, sir.

MR. SKRZYNSKI: Thank you very much. I don't have anything further.

THE COURT: Mr. Cataldo?

MR. CATALDO: Am I required to be polite to him, your Honor?

THE WITNESS: Don't start now Bill.

MR. CATALDO: Nice suit.

CROSS EXAMINATION

BY MR. CATALDO:

Q When you do the will--or when you did the will, had you done any other legal work for Mr. Rogers at the time?

A At that--contemporaneous to that?

Q Right.

A No, sir. No, sir.

Q Even then before that or after?

A I did--I think I did some work before that, for them.

That is correct. I think though, however, to be honest, it was for Mrs. Rogers, more so than it was for Mr. Rogers.

Q Okay. There was a divorce between these two in 1987,

* * *

[Page 124]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Donald Zimmerman}

DIRECT EXAMINATION

BY MR. SKRZYNSKI:

Q Would you state your name please, sir, and spell your last name?

A Donald Zimmerman, Z-I-M-M-E-R-M-A-N.

Q Detective--you're a detective, correct?

A Yes, sir.

Q With the Troy Police Department?

A That's correct.

Q And how long have you been employed with Troy?

A 23 and a half years.

Q And how long have you been a detective, sir?

A Approximately seven years.

Q Seven years? Okay. You are one of the officers in charge of this case, is that correct?

A Yes, I am.

Q Alright. Pursuant to--you did several things on this case, am I correct Officer?

A Yes, sir.

Q And one of the things that you did was on January the 6th of 2001, did you go to the Rogers' address at 2090 Grenadier in Troy with a search warrant for items that were named in the search warrant?

A Yes, I did.

Q Okay. When you got there, what happened? Tell the

[Page 125]
jury what happened.

A We met Mrs. Rogers at the door. She allowed us into the house. We explained to her that we had a search warrant to search her house for specific items. I told her that some of the items that we were going to be looking for were financial documents. I asked her for any documents that she might have and she provided me her checkbook. Actually two checkbooks.

Q Okay. Now, Detective, you were here before when I showed--I marked proposed Exhibit Number 12 and showed it to Mr. Chahine. Do you recognize Exhibit Number 12?

A Yes, I do.

Q And what is that, sir?

A This is a checkbook of Billie Rogers, drawn on Bank One, and it has my initials and the date on it.

Q Okay. And how- -can you describe how you actually came in possession of that?

A Mrs. Rogers handed it to me.

Q Okay. That was her checkbook then?

A It was.

Q Okay.

MR. SKRZYNSKI: At this time, your Honor, I would move to admit proposed Exhibit Number 12.

[Page 126]
MR. CATALDO: No objection, your Honor.

THE COURT: Okay. Then I will admit it.

BY MR. SKRZYNSKI:

Q Okay. Now, Detective, you actually had the opportunity to actually look into this checkbook, is that correct?

A That's correct.

Q And you heard the--why is it that you thought that this checkbook was important?

A Well, number one, it was a financial document that would contain any expenditures that Mrs. Rogers had made and money payment was an issue in this case.

Q Was there any other reason why this particular checkbook was important?

A There were some writings at the back of the checkbook that I believe are important. Yes, sir.

Q And how do you think those are important?

A Well, specifically, there's a writing indicating the name Von Lee, followed by the amount of $100,000.

Q Okay. I want to just put this on my projector for just a second. Now, Mr. Chahine testified about seeing an exchange of payments at the casino between Billie Rogers and Von Lee Titlow. Do you remember that testimony?

A Yes, I do.

[Page 127]
Q And he remarked about that there was a score card being kept by Billie Rogers?

A That's correct.

Q Alright. Did you come to think that this book was related to that testimony?

A I did. I called it a ledger, but the $100,000 obviously was of significance.

Q Um hm.

A And I remember in talking to Mr. Chahine, he had mentioned something about a 7 or a 700 and that's clearly two lines below the 100,000.

Q Okay. The other--there are some other numbers that are written up here, sir. Specifically, this number her. 70,260. Do you see that number, sir?

A I do, sir.

Q I want to show you Exhibit Number 26, which has been admitted into evidence, and that was a check that was written from Billie Rogers to Von Lee Titlow, is that correct?

A Yes, that's correct.

Q You heard the testimony earlier that the check was actually paid out and that Titlow, with those funds, purchased a certificate of deposit and made a deposit to a checking account of $4,000 and a savings account of $5,000. Do you remember that testimony?

[Page 128]
A I remember it, yes sir.

Q Okay. I just want to show the jury--and the amount of this check, sir, was what?

A $70,260.

Q Okay. This is that exhibit, sir?

A It is.

Q Okay. And that was kept--that number was also contained in the book, People's Exhibit Number 12?

A Yes, sir, that's correct.

Q Alright. There were also other numbers that were recorded in the book and I want to point out to you this number here, 19,000--$19,838. And did you come to learn what that number was related to?

A Yes. I believe that relates to the figure that was used to purchase the white Buick Riviera.

Q Okay. I'm going to show you Exhibit Number 25 and this was a check that was written to Suburban Cadillac, is that correct? Can you--I know that's a dark copy.

A You're correct, sir.

Q Do you know--see the amount on that?

A It appears to be $19,837.30.

Q And 30 cents. Okay, I want to show the jury. This is Exhibit Number 25. I know that's kind of hard to see. Can you see that number there, sir? $19,837.30, is

* * *

[Page 155]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Paul Livernois}
THE COURT: Yeah. They're really friends. Okay.

MR. SKRZYNSKI: Okay.

BY MR. SKRZYNSKI:

Q Mr. Livernois?

A Um hm.

Q I want to point out--can you look at the records that are on the Cadillac, I think that's number 35?

A Correct.

Q Okay. Ask you if your records reflect any activity on August the 17th, regarding that automobile?

A August the 17th would have been the day that Billie Jean Rogers made the commitment to buy the vehicle.

Q Do you remember that date? August 17th, 2000?

A Sure.

Q And do you remember the people that came in that day?

A Yes.

Q Can you tell the jury what you remember happening?

A Billie Jean Rogers came in with Nicole Von Lee Titlow and originally agreed to buy a vehicle. They test drove a Cadillac, the 2000 Cadillac STS, together. I sent them out on a demo drive. When they came out--came back, they decided that they wanted the vehicle.

Q Alright. Who--

A Billie Jean Rogers wanted the STS for herself.

[Page 156]
Q --okay.

A They agreed to buy the vehicle?

Q She did?

A Billie Jean did, yes.

Q Okay. So, did she sign a agreement or--

A She signed a purchase agreement. Gave me a $100 deposit that day and arranged for delivery for another day.

Q Okay. Now, do your records reflect whether there was contact with her regarding that car on another day?

A I'm sorry?

Q Do your records reflect contact with Billie Jean Rogers regarding that car on another day? A subsequent day?

A Yeah. The actual delivery date was on the 21st of August.

Q Okay.

A That's when she came back and picked up the car.

Q Can you describe--do you recall that date, sir?

A Sure.

Q Do you recall what happened on that date?

A I believe they both came in together again. Billie Jean and Nicole Von Lee and while Billie Jean was

signing the documents for delivery of the STS, Nicole Von Lee Titlow decided to take a look and see if there

[Page 157]
was something on the lot that she liked. She looked throughout the used car lot and eventually settled on the Riviera.

Q A Riviera?

A Um hm.

Q Okay. Now, do your records reflect that any payment was tendered for the Cadillac on the 21st?

A The 21st she paid for the car in full, by check.

Q And what was the total amount of the payment?

A 50,574.40

Q Now, do you have--

A I'm sorry, 576.

Q --I'm sorry, what?

A 576 I show.

Q Okay. Do you have in your file a xerox of the check by any chance?

A Of the check from Billie Jean?

Q Yeah.

A Bear with me. I don't have a copy of the check.

Q Okay. Well, then let me just show you this then. This is People's Exhibit Number 27. And again, your records reflect that the--

A Um hm.

Q --total payment on that was $50,576.80 I believe?

A Yes.

* * *

[Page 160]
{Q = Direct examination by Mr. Skrzynski;
A = People's Witness Paul Livernois}
A I show a delivery date of the 24th.

Q 24th, okay.

A As far as the 21st goes, she may have put a deposit. I'd have to look through my records.

Q Okay.

A It looks like as far as the 21st--

MR. CATALDO: I would indicate the Prosecutor knows the dates, I would stipulate to--

MR. SKRZYNSKI: No, that's okay.

BY MR. SKRZYNSKI:

Q Nothing happened on the 21st?

A --it looks like that's the case.

Q Alright. Do you recall on the 21st having a conversation with Titlow--

A Yes.

Q --regarding her supply of money?

A Yes.

Q Can you tell the jury what the conversation--what did you say and what did she say?

A It was going to be a car that Billie Jean was going to buy for her. I mean she was going to, you know, get the money from her aunt. It was actually going to be taken care of by her aunt.

Q Okay. Did she say anything else about money?

A Not to my recollection.

[Page 161]
Q Okay. What do your records reflect the next contact with her regarding that car was?

A According to my documents here, the 24th of August she picked up the car.

Q Okay.

A She took delivery of the car and--

Q Do you recall--

A --paid for the car.

Q --that date?

A Yes.

Q Can you tell the jury what happened on that date?

A Nicole Von Lee Titlow came in to purchase the vehicle. Took delivery of the vehicle. Signed the documents for it and paid for the car by way of check from her aunt, Billie Jean Rogers.

Q Okay.

A Who was actually out in the car. I just ran out to the car to get the check and verify that it was all cool.

Q Billie was waiting for her out in the car?

A Yes.

Q Alright. And did you--what was the purchase price of that vehicle?

A Out the door, 19,834.90. 19,834.

Q Okay.

STATE OF MICHIGAN
SIXTH JUDICIAL CIRCUIT COURT
(OAKLAND COUNTY)

PEOPLE OF THE
STATE OF MICHIGAN,

vs. Case 01-177745-FC

VON LEE TITLOW Oakland County
Judge Wendy L. Potts
Defendant. People V Titlow, Vonle
_____/

TRIAL
TAKEN BY VIDEO TAPE RECORDING
BEFORE THE HONORABLE WENDY POTTS
CIRCUIT JUDGE
Pontiac, Michigan - Monday, March 18th, 2002

APPEARANCES:
For the People: JOHN M. SKRZYNSKI (P33013)
1200 N. Telegraph Road
Pontiac, MI 48341
(810) 858-0656

For the Defendant: FREDERICK M. TOCA (P56608)
485 Orchard Lake Rd.
Pontiac, MI 48341
(248) 334-1587

Fara Duffey
CER 0904
Livingston-Oakland Court Reporting
(810) 229-9487

[Page 2]

TABLE OF CONTENTS

PAGE

WITNESSES: (PEOPLE)
DONALD ZIMMERMAN (REBUTTAL)
Direct examination by Mr. Skrzynski 217
Cross examination by Mr. Cataldo 220

WITNESSES: (DEFENDANT)
DR. BADER CASSIN
Direct examination by Mr. Cataldo 7
Cross examination by Mr. Skrzynski 62
Redirect examination by Mr. Cataldo 79
VON LEE TITLOW
Direct Examination Mr. Cataldo 81
Cross Examination Mr. Skrzynski 167
Redirect Examination Mr. Cataldo 212

EXHIBITS: IDENTIFIED RECEIVED
(None)

* * *

[Page 16]
{Q = Direct examination by Mr. Cataldo;
A = Defendant's Witness Dr. Bader Cassin}
them. I had their photographs from the scene of death. I had the medical examiner, the Oakland County Medical Examiner's office file materials, though I don't know if I have them all. I had the toxicology data from the laboratory and some conclusive reports from them. I had the external examination reports with opinion. I had the investigator report from there. I believe that's all the objective documentation I had. Other than that, I had some testimony. Some written--I'm sorry it was given orally, but I had the transcripts of testimony given at previous trial and examinations.

Q Based on your review of all that documentation, have you come to a professional conclusion as to Mr. Rogers' cause of death?

A Yes, sir.

Q And what is that?

A Mr. Rogers died of acute alcohol intoxication.

Q Now, what makes you say that?

A Well, I say that based on the evidence made available. And I say that also the way I'm trained to as a medical examiner. Medical examiners are supposed to use available evidence and come to a reasonable conclusion based on that evidence and be reasonably certain about that. This is what we're asked to do by

* * *

[Page 63]
{Q = Cross examination by Mr. Skrzynski;
A = Defendant's Witness Dr. Bader Cassin}
{Q} an upholstered pillow with a rough surface, if that was the testimony, the abrasions on the lip and nose corroborate that, isn't that true?

A I can't exclude that possibility, Mr. Skrzynski.

Q But those abrasions are consistent with somebody placing a pillow, an upholstered pillow over Mr. Rogers' head and smothering him, isn't that correct?

A That's possible, simply because--but you're asking me about a pillow I haven't seen. I don't know how irregular it's surface was, but if it passes all those tests--

Q Um hm.

A --then it's possible.

Q I'm not asking you if it's possible, I'm asking you if those abrasions are consistent with a scenario like that?

A I think you could go so far as to say that explanation that might be used.

Q Okay. Now, Doctor, you said that the diagnosis of arterial sclerotic cardiovascular disease or hardening of the arteries was a reasonable diagnosis for Dr. Ortiz to make at first, correct? Based upon statistics?

A I don't think I said that, Mr. Skrzynski.

Q I think you did.

* * *

[Page 68]
{Q = Cross examination by Mr. Skrzynski;
A = Defendant's Witness Dr. Bader Cassin}
{Q} intoxication, correct?

A That's right.

Q But if you add in the testimony that we smothered this man, you can't say that that did not happen, can you?

A As I said, I can't rule it out.

Q Alright. And, Doctor, isn't it true that you can smother someone without leaving any pathological signs behind, isn't that correct?

A That's true.

Q And you are familiar with the term Burking, are you not?

A Yes.

Q And that's--that is--that is a type of smothering where there is no trace left behind, isn't that correct?

A Well, there may or may not be, but--

Q Little trace?

A --yes.

Q Like maybe an abrasion on the lip or the nose?

A Or maybe in the injury in the abdomen or on the chest from putting a lot of weight on somebody's chest.

Q So either one?

A Yes.

Q Okay. Now, on autopsy as well, you would have no pathological findings on autopsy if there was

* * *

[Page 130]
{Q = Direct examination by Mr. Cataldo;
A = Defendant's Witness Von Lee Titlow}
Q Were you feeling it?

A I was pretty inebriated.

Q What happened after you checked the body?

A I told Billie that he wouldn't wake up and she said I'll get him up and she got up out of the family room and came around to where he was.

Q Now, the photographs indicate that the legs are crossed. When you first saw the body, what was the position of the legs?

A Crossed. I mean, I guess. I didn't look at the legs. I really didn't pay attention. That's not fair for me to say they were crossed, because I don't know. I didn't look at his legs really.

Q Did you ever touch his legs?

A No, I did not.

Q Did you ever move his legs?

A No.

Q Where are you standing when Billie comes into the room?

A Over here.

Q And approximately how far would that be from Mr. Rogers' head?

A Real close, right at his head.

Q What happened when Billie came into the kitchen?

A She told me to--to hold his mouth and hold his nose

[Page 131]
and that would wake him up and I told her no. That I was not going to do that. I was not going to do that, because I was afraid I would hurt him.

Q What did she do after you told her?

A After that, she said well, you hold his mouth and I'll hold his nose and I did. I was--my judgment was very poor and I shouldn't have, but I put my hand over his mouth, but I was keeping my fingers apart like that. He was breathing. And I kept letting go of his--like that--I told her, I'm not doing that. I can't do it. I just can't do that.

Q Did you ever put your hand over his mouth so it was clasped like Dr. Dragovic showed in (undeterminable)?

A Never. I never held his mouth to where he couldn't breathe. I would never hurt anybody, ever. And--

Q Show me how your hands were?

A --like that.

Q For the record, there's spaces in between your fingers?

A Yes, sir.

Q Did you ever close those spaces down?

A No, I did not.

Q Where is--where are you standing when you're doing that?

A Around in--

* * *

[Page 133]
{Q = Direct examination by Mr. Cataldo;
A = Defendant's Witness Von Lee Titlow}
did this all the time. Maybe this is how she wakes him up. I really wasn't thinking. I mean--

Q Is being drunk an excuse?

A --no, it's not an excuse. But I didn't think she was trying to hurt him.

Q Were you?

A No, I was not. That's--

Q What was going through your mind while you're doing that?

A --what was going through my mind? I don't know. I was very drunk and it was like a game. It was just--I wasn't really aware of my surroundings. I wasn't aware of what she was trying to do at the time. I mean--she--and then when I wouldn't hold my hand over his mouth, I just wouldn't do it. I told her I can't do that. I can't do that. She took the vodka bottle and I think the bottle was sitting on the counter or on the table, cause she--

Q Keep your voice up.

A --on the counter or table, because she grabbed it and she poured some in his mouth.

Q Now, where are you when she's doing that?

A I was still right there on the other side.

Q Would you flash that laser please?

A Right here.

* * *

[Page 136]
{Q = Direct examination by Mr. Cataldo;
A = Defendant's Witness Von Lee Titlow}
A She gave it to me and told me to do it.

Q Now, you had indicated previously that you were standing. What position did you get into?

A I squatted down and poured a little shot into--I poured a little bit into his mouth.

Q Do you know how much you poured in his mouth?

A Just a little. And it seemed to like make her mad, because at that point she grabbed the bottle from me and she said, oh hell, and she poured it up his nose. And after she poured it up his nose, I just--he shook his head and I just thought at that point she was going to hurt him. I didn't think she was trying to kill him, but I thought she was going to hurt him.

Q What were you saying?

A I took the bottle away from her and told her to leave him alone, that she was going to hurt him and to stop wasting the vodka.

Q Now, Mr. Chahine seems to indicate that when you said stop wasting the vodka, it was because it was good vodka.

A I said--

Q Giving the impression--let me finish the question--that you wished to use bad vodka instead. What did you mean when you said stop wasting the vodka?

A I meant to stop pouring the vodka up his nose before

[Page 137]
you hurt him.

Q So it had nothing to do with the quality?

A It had nothing to do with the quality of the vodka.

Q Now, after you take the bottle away from Billie Rogers--

A Yes.

Q --what do you do with it?

A I went over and fixed me a drink.

Q Where at?

A At the counter, which was around on the other side of--

Q Let's see if we can find--this is People's Exhibit 5. If--if this yellow covering here is the body of Mr. Rogers, is--what is this right here?

A That's just the sink.

Q Speak loudly please.

A The sink.

Q Okay. Is that the direction that you headed in when you--

A Yes. I came around here and actually fixed me a drink right here. I got some ice out of the freezer, which is here.

Q Okay.

A And fixed me a drink and told her to leave him alone before she hurt him.

[Page 138]
Q What's Billie doing during this time?

A She walked away from him. And I said leave him alone before you hurt him. I said I'm going to fix a drink and I'm going to go to the bathroom and get ready and we'll go to the casino. I said he'll sleep til we get back. Just leave--

Q What time of night was this approximately?

A --about 9:30, something like that. 9, 9:30.

Q What do you do after you fix the drink?

A I went to the bathroom.

Q Just the best you can, where is the bathroom in relation to--

A This is the counter here.

Q --alright.

A The bathroom is like you walk this way, it's right in here.

Q So, in looking at this photograph--

A (undeterminable) .

Q --would you be coming down this hallway toward where the photographer is or would you be staying in the kitchen and going this way?

A That way.

Q So if you're standing in the kitchen, you'd be going that way?

A Yes, sir.

[Page 139]
Q The restroom is off the kitchen somewhere?

A Yeah. Off--when you come in the garage, the restroom is right there.

Q How long were you in the bathroom?

A I put on some lipstick and I peed and then I sprayed my hair and teased it a little bit. I'd say about five minutes.

Q What did you see when you came out of the bathroom?

A When I came out of the bathroom, there's another picture there, well, I could--

Q The other picture we had up? This one?

A --well, when I came out of the bathroom, I came this way. No, the other one. I'm sorry.

Q Different picture?

A The first one is better. Yeah. I came out of the bathroom, which is right over here and I walked past here and I seen her squatted down right here and--I was going to go upstairs, because I thought that's where she would be, would be upstairs getting ready. And when I seen her, I walked over toward her and I said, what are you doing? I saw she had a pillow on his face. And so I asked her--

Q Now, can--can you describe the pillow?

A --it was green. Like a--

Q Did you see where she got it from?

[Page 140]
A --no, I did not.

Q Then before you went to the bathroom or into the bathroom, where was she? Billie Rogers.

A She had walked out this way. I think she--

Q Is there an entrance to another room when you--

A --yeah, it goes to the dining room.

Q --okay. So describe again, you're coming around the counter?

A I came around this way, from the bathroom.

Q (undeterminable) .

A She's standing like right here.

Q Alright. What position is she in? You indicate she's--

A She is squatting.

Q - -when you say she's squatting, can you be more specific?

A I can show you. I mean--

Q If you would stand up?

MR. CATALDO: I have my pillow that I brought, your Honor, for demonstration purposes.

BY MR. CATALDO:

A She was like that. Down like this and she had the pillow on his face like that.

Q Were her knees on the ground?

A I don't think so.

[Page 141]
Q Where was her body positioned in relation to Mr. Rogers' body?

A Right here.

Q So she was on the side that you had been on previously?

A Right. I'm sorry. Yes.

Q Did you get her that pillow?

A No, I did not.

Q Did you suggest to her that he should be killed?

A No, I did not. I actually told her to leave him alone before she hurt him.

Q What did she say when you said that?

A She--well, at she left him alone. I mean, when I took the bottle away from her to go fix the drink and told her to get ready, let's go to the casino, I figured she would get ready and we'd go to the casino.

Q What do you say to her when you see her holding the pillow over Don Rogers' face?

A I said what in the fuck are you doing?

Q What did she say?

A Well, as soon as she heard me, she moved the pillow. She said she had to do it, because if she didn't, he would know what we were going earlier.

Q Now, for the--we had heard something about you holding Don down. Where were you standing in relation to--if

[Page 142]
Billie is right here with the pillow--

A Right.

Q --where are you standing in relation to what you're saying?

A Over here, next to the sink.

Q Alright. How many feet from Mr. Rogers?

A Four, three, four.

Q Keep your voice up.

A Three or four.

Q At any time prior to this moment, had you asked Billie Rogers for money for a sex change operation?

A No.

Q Had there ever been any discussion between the two of you about a sex change operation?

A There had been discussion about me having a sex change operation.

Q Was there ever discussion about where the money was going to come from?

A No. I've had the money numerous times to have a sex change operation if I wanted one.

Q When you're standing approximately four feet from Mr. Rogers, do you ever come around and assist Billie Rogers?

A No, I did not.

Q According to Danny Chahine, you were helping to "pin

[Page 143]
him down".

A Don Rogers was passed out. I mean he was--no one was holding him down. He was passed out. He was, you know, unconscious.

Q Did you see--was he unconscious?

A He was not resisting. I mean he was--

Q He was what?

A --he didn't seem to be, you know--he didn't--I couldn't wake him up.

Q Did he move his arms?

A Not that I seen him ever move his arms, no. I didn't see him.

Q Did any time, during the time that Billie Rogers had the pillow on his face, did he move his legs?

A When I walked up, she took the pillow from his face.

Q So, were you even in there during the time that she had the pillow over the face?

A No, as soon as I asked her what the fuck are you doing? She took the pillow off.

Q What did she do after?

A That's when she said she had to do it and if--because he would know what was happening earlier and I told her I was--I told her, I checked to see if he was breathing at that point and he wasn't. And so I checked--I called 9--I told her I was going to call 9-

[Page 144]
1-1 and she--I started screaming and I started crying and she told me that I was not. That I was going to calm down and that I was going to get it together before I called anybody and she would be the one that would be doing the calling.

Q What are you feeling at this moment?

A Feeling very upset that it happened and I feel like that if I hadn't have been drinking that I could have like known that she was serious or--I don't know. I think I felt like I could stop it--could have stopped it I mean.

Q According to Mr. Chahine, you told him that she negotiating money with you while she was smothering Mr. Rogers. Did that happen?

A After--after it happened, she--no. After I told her I was going to call 9-1-1, then she did offer me money.

Q How much did she offer you?

A She offered me $25,000.

Q What did you say?

A I told her that I didn't want her money. I told her that I was not going to prison for her or anybody else and that I couldn't believe what she had done. And she

said, well, I'll make it 50 and I said I don't want your money. And she told me that well, if you

* * *

[Page 154]
{Q = Direct examination by Mr. Cataldo;
A = Defendant's Witness Von Lee Titlow}
Q Did he ask to see it or confirm it at that particular meeting?

A No, he did not.

Q Was that conversation before the conversation about Don Rogers?

A Yes, it was.

Q Did that conversation--where did that conversation with Don Rogers take place?

A Well, then he was getting very, very upset. And so I said, well, let's go to the car and talk about this.

Q And what car did you go to?

A We went to--I'm not for sure, I think it was my aunt's car.

Q And--

A She normally would drive.

Q --and what happened once you got inside the car?

A Well, I proceeded to tell him what had happened that night.

Q Do you remember specifically what you told him?

A Basically, what I just told you guys. That I had walked--I went to the bathroom, came back and that she had a pillow over his head and I thought she was joking and I told him about the vodka and I told him the whole story. And he acted like he didn't believe me about what I was telling him. He was more

* * *

[Page 157]
{Q = Direct examination by Mr. Cataldo;
A = Defendant's Witness Von Lee Titlow}
{Titlow} asked me what was wrong. She said you're just crying all the time. She said, is there something you're not telling me about that night or about Don' s death. And she said she had a sixth sense, that she was psychic or something. That she could just tell something was wrong. And I told her. I told her about--I said, yeah, your mother tried to get me to help her kill Don and I said I thought she was joking at first and then she got serious. And then she says, well--then Billie says, yeah, then I got--I told her about the vodka and Billie said that yeah, she had to take a pillow and she put it over his face and she killed him with the pillow. And Andrea said, after, said you need--you should buy her a car and a condo and put money in her bank account. And she said, can't you see what you've done to her. Look how upset you've gotten her and Billie said, why should I give her any money? She said, I've done everything. I've done all the work. She said why should I give her anything. She said I offered her $50,000 and she don't want it. And I told her, I said, I don't want your fucking money basically. And I got up and I went to the bedroom and started crying and then

about 30 minutes later, Andrea came in there and she said, mother's agreed to give you $100,000 and that you need to keep your mouth

[Page 158]
shut. That if you don't, you're both going to get in trouble and that it would be the smart thing for me to take that money and just get my life together and just forget it even happened and pretend like it never happened.

Q I'm going to show you a document that was introduced as one of the Prosecutor's Exhibits. This was introduce as People's Exhibit Number 12.

A Okay.

Q And do you see the spot on there that has your name and the $100,000 after that?

A Yes, there is. Or no, I mean--

Q Did you write that in there?

A --no.

Q Do you know whose book that was or is?

A I assume it's Billie's.

Q Did you ever receive $100,000?

A No.

Q But you did receive a car?

A She gave me a car.

Q And how long- -that car was purchased for you, I believe on, it was testified, August 24th?

A Yes, it was.

Q You didn't turn it back in?

A The car?

[Page 159]
Q Yes.

A No.

Q You didn't resist the car?

A No, because I--at that time, the car was sounding very good, because I wanted to be able to get away from her.

Q And despite the fact you say you did nothing, you still took $70,000?

A Yes, I did.

Q Why?

A Well, I was drinking. She gave it to me. I wanted to get away. I didn't want to go home to Tennessee. I knew they would know I was upset and I figured it was a way I could just start a new life and I just figured, just take it and--I don't know, I just took it. Because she gave it to me.

Q Did she give it to you because you helped?

A No. She actually after--I mentioned to my mother what she had done and my mother said she was going to go to the police and she told my mother if you go to the police, I'll make sure that Von Lee gets into more trouble then me and she won't be able to make it in prison. And she said she had enough money and she said she would not spend one day in jail.

Q Well, we know that you received the car for $20,000.

[Page 160]
We heard testimony earlier from a bank rep, that you put $60,000 I believe into a CD?

A Yes.

Q And then you also put 5,000 into a checking and $4,000 into a savings?

A I--yes, that's right.

Q And then you withdrew $10,000 of that $60,000?

A Yes.

Q What did you do with that money?

A I gave 5,000 to the White Elephant and 5,000 to the Brown Elephant.

Q What's the White Elephant?

A That's for AIDS.

Q What's the Brown Elephant?

A That's for AIDS also.

Q We know that the last time you physically saw--well, let me ask you the question this way. When was the last time you physically saw Danny Chahine?

A The night of the taped conversation.

Q On September 1st of 2000?

A Yes.

Q Had you been staying at the Rogers' house up until that point?

A Yes.

Q Where did you go after that?

* * *

[Page 164]
{Q = Direct examination by Mr. Cataldo;
A = Defendant's Witness Von Lee Titlow}
{Q} you said that?

A Well, he just kept asking my questions and at one time, I told him I don't remember exactly everything that happened. And he says--on the tape, he says, I told you, you do remember. I told you what happened. I told you what happened.

Q Were you--

A And I was like, what do you mean you told me what happened. You weren't--you know, you weren't even there.

Q --were you afraid when you were in the car?

A He was acting strange. I was a little--I don't know if I was afraid. I thought he was acting strange.

Q On page three, you very clearly on the tape said, fucking drinking drove me to kill somebody. What did you mean by that statement?

A Because prior to coming to Michigan I was in AA and in AA they teach that what your life was and what it is like now and how you get there and they tell stories about different bad things that's happened in their life and they tell you, like if you don't start drinking, that bad things are going to happen to you. And one of the steps is to turn your life over to God or the higher power that you understand and by doing that, it was--that no humanly possible to stop

[Page 165]
Drinking, you have to have God to help you and I had promised God that if he would help me stop drinking that I would stop, you know--I would never drink again. And then after this happened, I felt like that he was, you know, showing me that it was my--I just felt like it was my fault. If I had not stopped drinking--if I hadn't have been drinking that night, I could have stopped her. I could have known that she was serious. I was just blaming myself. I felt like it was my fault. If I hadn't have been drinking, because I had made that promise to God that I would stop.

Q Now, he indicates in here in a question to you, he says, now you're a rich woman. What did you discuss with him about the money situation?

A I told him that I didn't want that money. That felt guilty for even taking the money. That even--that I

couldn't enjoy money that was given to me under those circumstances. That even when I would go to have my nails done or my hair done or something, that I felt bad about, you know, spending the money.

Q But you bragged to him that she wrote you a $100,000 check.

A I was not bragging that she wrote me a $100,00 check.

Q Did she ever write you a $100,000?

* * *

[Page 195]
{Q = Cross examination by Mr. Skrzynski;
A = Defendant's Witness Von Lee Titlow}
Q No, you didn't. Okay. But that' s--that' s a big detail, is it not?

A I actually kept (undeterminable)--I didn't want to--

Q Do you believe that's a big detail?

A --now, yes I do.

Q At the time, did it seem like such a big detail to you at the time?

A I really didn't want to discuss it with him.

Q You were afraid that Billie was going to tell the cops that you were the one that was responsible for all of this, correct?

A Yes, I was.

Q But you actually had actually gotten up and left the room and gone to the bathroom while this was being done, correct?

A Correct.

Q And wouldn't that be the perfect thing to tell the police if you didn't want the police to believe what you--you had killed Don? Wouldn't that have been the perfect thing to tell them?

A It would have been the right thing to do, yes.

Q But you didn't tell them that, did you?

A No, I did not.

Q Right. And you didn't tell Danny that in the car on the way to Showgun on September 1st, did you?

* * *

[Page 204]
{Q = Cross examination by Mr. Skrzynski;
A = Defendant's Witness Von Lee Titlow}
{A} money, I did all the work.

Q Right.

A That's what Billie said.

Q Right. And you wanted the money by this time, right?

A No. I told her I don't want your f-ing money and I went to the bedroom. Andrea, her daughter, convinced me to take the money.

Q So Andrea convinced you to take $100,000, even though you had done nothing wrong?

A Right.

Q You had done nothing to earn that money. Andrea convinced you to take $100,000?

A She--her exact words were, the best thing for you to do is take the money and keep your mouth shut.

Q But you didn't want that money, right?

A Sure. I mean, who wouldn't take $100,000 from somebody that's going to give it to you?

Q Now, you're saying to that you--you never asked Danny to be an alibi or that neither one of you never asked Danny to be an alibi?

A I told Danny that Billie said she would ask him to be an alibi, but she was afraid that he would blackmail her.

Q Alright. Isn't--isn't it true that what happened was that originally the police came at around 4:30 in the

* * *

[Page 206]
{Q = Cross examination by Mr. Skrzynski;
A = Defendant's Witness Von Lee Titlow}
A I had spoken to Danny about it.

Q Yeah.

A At one--

Q So when you're telling Billie that you had not, actually you had, so you were lying to Billie, correct?

A Correct.

Q Alright. And then you told Andrea about this too, right?

A Yes, I did.

Q And isn't it true also, that later on Andrea writes a check and forges Billie's name for $240,000, that's the check we stipulated to, that actually she forged Billie's name on that check and she did it because she knew about this murder too now and that she was actually blackmailing Billie herself, isn't that true?

A I come to learn that later, when--

Q And you talked to Billie, that's how you found that out, didn't you?

A She called me in Chicago. Or she had told my grandmother that I needed to call her or something like that.

Q But she told you at that time that Andrea had forged at $240,000 check and that was because Andrea wanted-Andrea wanted that money, because Billie knew that

STATE OF MICHIGAN
SIXTH JUDICIAL CIRCUIT COURT
(OAKLAND COUNTY)

PEOPLE OF THE
STATE OF MICHIGAN,

vs. Case 01-177745-FC

VON LEE TITLOW Oakland County
Judge Wendy L. Potts
Defendant. People V Titlow, Vonle
_____/

TRIAL
TAKEN BY VIDEO TAPE RECORDING
BEFORE THE HONORABLE WENDY POTTS
CIRCUIT JUDGE
Pontiac, Michigan - Tuesday, March 19th, 2002

APPEARANCES:
For the People: JOHN M. SKRZYNSKI (P33013)
1200 N. Telegraph Road
Pontiac, MI 48341
(810) 858-0656

For the Defendant: WILLIAM L. CATALDO (P37673)
29350 Harper
St. Clair Shores, MI 48081
(248) 354-6677

Fara Duffey
CER 0904
Livingston-Oakland Court Reporting
(810) 229-9487

[Page 2]

TABLE OF CONTENTS

	PAGE
People's Closing Argument	4
Defendant's Closing Argument	38
People's Rebuttal	56
Jury Instruction	62

WITNESSES: (PEOPLE)
(None)

WITNESSES: (DEFENDANT)
(None)

EXHIBITS:	IDENTIFIED	RECEIVED
(None)		

* * *

[Page 16]
{People's Closing Argument}
bottle to the Defendant. The Defendant takes the bottle, pours a little bit down his throat, it's not working. Don is not dying. Finally, Billie says to the Defendant, listen, we've got to do this. Because if he wakes up tomorrow morning, he's going to know that we tried to kill him. We've got to get this done and if you want that money, you better do something. I'll give you $50,000. But you gotta do something. You've got to hold him down. Billie goes and gets the pillow. She goes to the living room--or the family room. She gets the pillow, which the Defendant described as having rough fabric. Danny tells us that the Defendant held Don down and Billie smothered him. We know eventually that Dr. Dragovic, when he examines the photographs, as a matter of fact, the Defendant's own expert, Dr. Cassin, examined the same photographs

and says there is an abrasion. There's a scrape on, the nose and there's a scrape on the lip, consistent with rough fabric being scraped across his face. Not only that, but if you look at the location of those scrapes, as they're pointed out, and you'll have this picture to take into the jury room with you, and I suggest to you that we've putting things up on this projector and it--that enlargement has distorted the color a little and if you look at the lip and the

[Page 17]
nose, you will be able to see those abrasions better. So I suggest that you take this photograph and you look at it. And Dr. Dragovic says he saw those. Dr. Cassin said he saw them. This is a picture of Don at the time he was brought into the medical examiner's office. Those scrapes were there. They were caused by Billie putting that pillow over his head. Not only that, but if you think about it, the way the scrapes are arranged on the face, it's consistent with Billie standing or kneeling at Don's head and reaching over, meaning up here, and putting the pillow on him and smashing it down and smothering him. Where was the Defendant? Well, ladies and gentlemen, I suggest to you that the Defendant was on top of Don, holding him down. And we'll talk about Don fondling her while he was dying. That he died a happy man because he was fondling her. It's not that at all. Don made a feeble attempt to push the Defendant off of him and he hit her chest and his arm falls to the side. That's what happened. Finally, Billie completes the job. Don is no longer breathing. The Defendant tells us that. Don is no longer breathing. They take the pillow, they take the bottle, they leave, they throw it out. At first the

Defendant says that it was Billie that did it. Then later, Defendant tells

[Page 18]
Detective Tullock and Detective Zimmerman that she did it. They get rid of it. They call the police and we know the rest. Danny tells this store to the police and they say, okay. That's a very interesting story. Would you be willing to wear a wire and go out with the Defendant again and see if you can get this story repeated, so we have some evidence of it? And Danny says he'll do that and two days later, on September the 1st, the Defendant contacts him about going to dinner at Showgun, the Showgun restaurant. And so he wears a wire and he produces this tape. You heard the tape. You've seen the transcript. Let's talk about that for a second. Danny says he's in the car with the Defendant for several minutes and the Defendant, as you heard, discusses several things about what goes on. And if you keep in mind what the Defendant told Danny about the fact that Billie had told him, you've got to do something. If you want this money, you've got to do something. You've got to hold him down. Think about that bit of information when we start talking about what actually happens here and what the Defendant is saying to Danny Chahine. This is on tape. One of the first things that the Defendant says to Danny Chahine, on page two of the transcript, he says fucking drinking drove me to kill someone. And

[Page 19]
I apologize for the language that I'm going to use. But I'm going to say what the Defendant said to Danny Chahine, which is on the tape. Fucking drinking drove me to kill somebody. And if you think about what she's

told Danny, that she held Don down while Billie smothered him, that's exactly right. Now, of course, the Defendant's saying I was drinking. I was drinking very heavily and you'll see in a few minutes that theme gets repeated. And yet the police all testified, they are trained in detecting intoxication of (undeterminable) people. They said she had no slurred speech, no glassy eyes, no odor of intoxication. She wasn't stumbling. She understood what they were asking her. There were no signs of intoxication on Titlow at all. That's the first thing. One of the very next things that Titlow starts to ask about, you're not recording this or anything? Are you going to blackmail both of us? She says, meaning Billie, yeah, Danny will be an alibi for us, then he'll be fucking blackmailing us in court. Remember I asked the Defendant yesterday if they had ever asked Danny to be an alibi? Remember Billie had come home, they had called the police at 4:30 in the morning, but somebody had told the family at the funeral that they had actually come home at 11. That

* * *

[Page 23]
{People's Closing Argument}
the morning the police come to the house. If that's all that the Defendant did, if the Defendant actually took the bottle away from Billie, like the Defendant says she did, and told Billie you're going to hurt him, don't do that, she took it away, she left the room, if she had done that, there's no problem telling the police that. You haven' t done anything wrong. As a matter of fact, you tried to save Don. Why does she say fucking drinking drove me to kill somebody? It's because she held Don down. Then she goes on to say, I don't have an excuse for what I did. But I was so fucking drunk

that I don't even remember. I started drinking that morning and sure I drank all day. I don't even really ought to remember. She was so--what she talked about, I don't have an excuse for what I did. Well, if you didn't do anything, as a matter of fact, if you tried to rescue Don, what are you talking about? What do you mean you don't have an excuse for what you did? What she did was to hold Don down while Billie smothered him. That's what she doesn't have the excuse for. That's why she mentions it to Billie-or to Danny. She goes on. Danny says okay, she did it. Billie did it. And he says okay, yeah, well you know what she's done, meaning Billie, what's Billie done is done. And the Defendant says I've done it too

[Page 24]
though Danny. He says it's not normal. She says but I've done it too. You have to realize that. So I'm not normal either. I've done it too. She held him down, while Billie smothered him. Why is she selling-telling Danny I've done it too, I'm not normal either? She helped Billie kill Don Rogers, just like Danny told you, which is just what the Defendant told Danny. I've done it too. And then she goes on. He says I can't go the rest of my life. I've asked God to forgive me. Well, forgive me for what? You didn't do anything wrong. You left the room, remember? I've asked God to forgive me and I've prayed every night and I know what I did is wrong. And I'm like whatever you feel is right God, do it. I mean whatever you need. I know what I did is wrong. She held him down. That's what she's talking about. Then she goes on. I've prayed and prayed for my life to get together. I used to pray constantly, all the time. Please, show me a way out of this. Show me a way so I can have my surgery and have a normal life. And I

asked God and so maybe he was getting ready to take Don any way and this--he gave me an opportunity to get my life together, so I can have my surgery. Remember the Defendant told you yesterday that was a figment of the media's imagination. The media made that up. That

[Page 25]
wasn't a motivation for me. There it is. There it is. Maybe God was going to take Don anyway and so he let me kill Don or help kill Don, so I could have my surgery. She goes on. But I've asked for forgiveness. Again, what are you asking for forgiveness for? You didn't do anything. I think that he knows what happened to me was that I was a victim. I really think I was a victim. I really do. Everything that was going on, I mean she knew how bad I wanted my surgery. Remember yesterday the Defendant lied to you and said that was not even a consideration. That's something the media made up. She knew how bad I wanted my surgery. She knew how fucked up I was about telling you my situation. What situation is that? That she is a man, not a woman. She said that was never a consideration either. But there it is. She knew how fucked up I was about it. Just crazy. I mean she could have stopped it. She could have just said no. Cause at first I was playing. I was just really playing, I thought it was funny, you know? Just being silly, whatever. Then she says I'll give you money or whatever and I honest to God just thought it was a big old joke at first. Then she got real serious. And then after she got

[Page 26]
really into it, seriously, and then she was like well, we can't stop now. He'll know we're trying to kill him. That's exactly what Danny said. We can't stop now, he'll know we're trying to kill him. If you want that money, you've got to do something. You better hold him down. You want your surgery? There it is. Billie knew how much I wanted my surgery. Billie knew how fucked up I was about telling you about my situation. There it is. There is the motive. That's not something that the media made up. There it is, in the Defendant's own words. The Defendant lied to you yesterday, denied that. But there it is. The Defendant said telling Danny about my situation, that didn't make any difference. That was a lie. There it is. Now, the Defendant starts to rationalize. She starts telling Danny, well, this is why I did it. Okay? It was only a joke, right? She said I only started doing this, because I was just blitzed. I don't know why. Then I hadn't had a hormone shot for almost a month. That making me just looney as hell right there. You can't do that. I'm not supposed to do that. They tell you do not get off those hormones like that. They will make you snap. And then her telling me about all the money and what we could do with the money and but it's over and it's done with.

* * *

[Page 30]
{People's Closing Argument}
did we have to do it? If I could figure that out, I'd tell you why. I don't know why I did it. I don't know why I held Don down while Billie smothered him. These are her words. This is on September the 1st, 2000. This is like two weeks after the murder. This is the truth.

She's talking to somebody that she was going with, somebody that she had feelings for, she's telling him the truth. She told him the truth when she told him that Billie said, you want the money? Hold him down. That was the truth. Well, she talks about finally about this. She says, I don't know. I mean you didn't see him. He was--he was mean. Don was mean. Don was mean. That's maybe another reason why we killed him. Maybe he was mean. And she finally says well, I don't know why. It was not the money. I didn't think I was going to get no $100,000. I thought she was going to give me $25,000. I mean I started--it was like joking, you think I'd kill somebody for $25,000? Fuck no. $25,000 can't buy you a car. I can make that in a month escorting if I really wanted the money. $25,000, remember that was the amount of money that Danny said the Defendant told him Billie wanted to pay to have Don killed. And that's the amount of money that Defendant told us that Defendant said, no, that won't do it. And so Danny

* * *

[Page 32]
{People's Closing Argument}
left. Billie did it. She says I was--now, I'm in the wrong place at the wrong time. And I was drinking and the drugs and all that. And then she says this. And I remember crying and telling Billie--I said I remember crying and telling Billie, I did this for you. I did it for you. That's the only fucking reason I did it. I did it for fucking you. Did what? Tried to take the vodka out of Billie's hand? Told Billie not to harm Don? Got up and left the room? I did it for you. I held him down for you. Why? Because I know that you're not going to live long. Remember? She's got a liver problem, that's the

testimony. And I know you want- -he was dying. I mean he was definitely, definitely dying. I mean basically, I was really tired of looking--I just never come to the point and drink to the point he was so miserable--I asked myself after--after it happened and everything, I thought I would rather somebody had killed me, then to let me go through that every day. She did him a favor. She'd rather have somebody do that to her, than to live the kind of life that Don Rogers was living. She did him a favor. And then she says, I mean basically, they say his whole insides were--I mean he was fucked up. I mean nothing makes it right. That's right. That's right. Nothing makes

STATE OF MICHIGAN
SIXTH JUDICIAL CIRCUIT COURT
(OAKLAND COUNTY)

PEOPLE OF THE
STATE OF MICHIGAN,

vs. Case 01-177745-FC

VON LEE TITLOW Oakland County
Judge Wendy L. Potts
Defendant. People V Titlow, Vonle
/

SENTENCING
TAKEN BY VIDEO TAPE RECORDING
BEFORE THE HONORABLE WENDY POTTS
CIRCUIT JUDGE
Pontiac, Michigan - Wednesday, April 17th, 2002

APPEARANCES:
For the People: JOHN M. SKRZYNSKI (P33013)
1200 N. Telegraph Road
Pontiac, MI 48341
(810) 858-0656

For the Defendant: WILLIAM L. CATALDO (P37673)
29350 Harper
St. Clair Shores, MI 48081
(248) 354-6677

Fara Duffey
CER 0904
Livingston-Oakland Court Reporting
(810) 229-9487

* * *

[Page 20]

MR. SKRZYNSKI: Your Honor, on behalf of the People, I want to urge the Court to adopt the probation department's recommendation, which is for 20 to 40 years. The Court heard the entire case. As a matter of fact, the Court has lived with this case for the last year. We've done a lot of litigation in this matter. We did a lot of litigation in Billie Rogers' trial. This Court knows the role that Nicole Titlow played both in the killing of Don Rogers, and that victimization, and then a second victimization that occurred, when we were about to try Billie Rogers. She was under no obligation to testify, of course. And she exercised her right not to. But for anybody to participate in a murder and then come up, when they had a chance, to make it right by helping the prosecution of the person that she claims really killed the man, she had that opportunity and she failed to avail herself of it. For her to say now that she's sorry, doesn't ring as true as it might of if she had actually gone together to help the people that she had hurt so badly. She had an opportunity to do that and she decided to roll the ball. Apparently, the people in this case like to gamble a lot. They spend thousands of dollars at the casinos and both of them roll the dice for the trials. Nicole wasn't

[Page 21]

quite so lucky as Billie was. Of course, Billie had Nicole's help when she rolled her dice. Nicole wasn't as lucky. I think that she's a victim of some bad advice. I don't know who gave it to her. I tried to give her some good advice and her original attorney did too. I think Mr. Cataldo did a very good job at the trial with what he had to work with. But this was a strong case against

her. We tried her based on her own words. This Court heard her own words. The jury heard her owns words. And when they did, they decided that this was a second degree murder. I have my own feelings about the degree of the case. But that's what the jury said and that's what the case remains. I'm asking this Court, therefore, because of the--the pain, the grief, the suffering and the irreparable damage that this person has done, both to Donald Rogers, who of course is dead, and to the survivors, the family that remains behind, I'm asking the Court, I'm urging the Court to adopt the recommendation of the probation department, which is within the guidelines and sentence the Defendant to 20 to 40 years. Thank you.

THE COURT: Mr. Cataldo?

MR. CATALDO: Your Honor, the only thing I guess I agree with what Mr. Skrzynski says is that there was

[Page 22]
a lot of gambling in this case. I--I came in as the third lawyer. If you ask my honest opinion, she, Von Lee, made a mistake. She didn't take the deal offered by the People up front. And my understanding is, it was going to be reduced to manslaughter with a ten year sentence. Mr. Lustig, a very fine lawyer, was able to work the Prosecutor, renegotiate down to seven years, 7 to 15. Then Ms. Titlow received some advice and made a decision that was different. And my fear throughout this whole sentencing process and from the moment in which the jury announced the verdict was that Von Lee was going to be made the scapegoat of this whole case. The People know that Von Lee passed a polygraph test. That's why they were willing to use her to testify and the issue that she passed the

polygraph on was the fact that when the alcohol situation did not have any effect, she walked away. She left the room. She came back several minutes later, after Billie Rogers had a pillow on Don Rogers' head and did nothing to participate whatsoever in that. And she passed the poly on that. Now, can I justify the fact that she took $90,000 and didn't say anything? No. Should there be some penance for what she did? Certainly. Legally and medically this Court heard from two experts that the participation by

[Page 23]
pouring alcohol in the throat of an unconscious man when there's no gag reflex had absolutely nothing to do with the murder. Had nothing to do with the manner of death. So, when we talk about gambling, I say that the people gambled in this case also. Because now this Court knows, as does everybody, that the real murderer is gone. That because the Prosecutor's office is blinded by their policy, we don't give anybody a break. We stand for nobody gets a deal. Alright. If they had been within the guidelines, she would have taken the deal. That was made known to the Prosecutor. The guidelines were two and a half to five. So, no, the Prosecutor said we're not going any lower. Take the risk. They gambled. The family loses, society loses, because the real murderer now walks. And now the real murderer is attempting to secure the remainder of the estate, the millions of dollars in the estate. That's the tragedy in this case. Everybody gambled. Ms. Titlow took the biggest gamble and she lost, for whatever reasons and now she's here. And now she faces a 20 year sentence for an act that she did in some minimal way participate in, that she did nothing to prevent. And, certainly, that bothers me as a citizen. It

bothers this Court. It should bother everybody. But the jury has now

* * *

[Page 25]
{Ms. Titlow}
both trials to conclude and all the painful things that were brought out during these trials. I am sorry that my Aunt Billie was not made to answer for her actions that resulted in Donald's death. I honestly don't know how she can live with herself to this day. I can only pray that you can see she took advantage of me, because of who I am and used my alcoholism to try to get me to help her murder Don. I'm sorry I let my drunkenness blind me from what Billie's true intentions were. I can only say that I am glad that I did not listen to her and lie for her, that she tried for months to talk me into. I am sorry I ever took one penny of that money in the first place. And I promise all of you, I will do all I can to help the family during the upcoming civil suits. So that in one way justice can be done. I grew up looking up to my Aunt Billie. As long as I can remember, I placed her on a pedestal. I loved her and trusted her and she betrayed that love and trust by trying to get me to help her murder Don. I am so sorry I was blind to see Bill--blind to see Billie for who she really is, a greedy, hateful, manipulating and evil person. In a way, I truly feel sorry for her. I thank God I could not go through with what she was trying to make

[Page 26]
me do. That I could not stoop that low, even as drunk as I was. But no matter what, this will haunt me for the rest of my life. I will never forget this. Never. This

has hurt my family also. And I'm sorry for the pain I visited on my mother, grandmother, sisters and brothers. Just everyone this horrible act has touched. I want to say I would have testified against Billie during her trial, had I not been persuaded to withdraw my plea agreement and the chance to testify, because an attorney promised me he would represent me. Even had me sign a book agreement for payment to take my case. He told me he could take my case to trial and win. He told me the head of a well-known law firm would be the ones who represented me in my trial. He told me my previous attorney was not doing enough for me. I don't know a lot about the law, because I've never been serious trouble before. So I trusted what he was saying. Also, this firm came to me. I did not go to them. After receiving some expensive jewelry and realizing they were not going to be able to get any money out of me, they walked out on me. I feel they tried to use me, just as my Aunt Billie did, for money and greed. I am glad that I took the witness stand and told the truth. I could not have done it otherwise. Enough lies had

[Page 27]
already been said. I am glad that I am not my Aunt Billie. I have a conscience and it is only because of my conscience that the truth of what happened that night to Don has come to light. And for everyone concerned, I am glad it has. I prayed that through all of this, the healing can take place for all of us, especially Don's family. And to this Court and you, your Honor, I thank you for allowing me a fair and just trial. After all the twists and turns and media attention it took to get there. I want to thank you for your patience, your Honor. And I want to thank you, Mr. Cataldo for all that you've done on my behalf. For all you and your

associate's time and concerns and providing me with the defense you have. I only wish I could have had you as my legal counsel from the very beginning. Again, to Don' s family, I am sorry for your loss and I pray that maybe one day you can find it within your hearts to forgive me for my part in all of this. I'm so sorry. It should have never happened.

THE COURT: Alright. Okay. I certainly have lived with this case and have stared at a number of your faces for many, many months. Both at pre-trials, trials and one of the things that I just want to make very clear on the record, the fact that you at some

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff-appellee,

v

LC 01-177745 FC
COA 241285

VONLEE NICOLE TITLOW,
Defendant-appellant.
_____/

COUNTY OF OAKLAND)
)ss
STATE OF MICHIGAN)

AFFIDAVIT OF WILLIAM PIERSON

1. I am an attorney licensed to practice law in the state of Michigan.

2. I am employed as an attorney with the Oakland County Corporation Counsel.

3. I represented the County of Oakland at an arbitration hearing involving Deputy Eric Ott in May and June of 2002.

4. Deputy Ott was contesting a decision to dismiss him from the Sheriff's Department because of his interference in the case of the People v VonLee Nicole Titlow, #01-177745 FC

5. No transcript is made of testimony at arbitration hearings, but I retained my personal notes from the arbitration hearing concerning Deputy Ott.

6. Testimony at the hearing showed that after Ms. Titlow passed a polygraph test and after she entered a guilty plea to manslaughter, Deputy Ott, assigned to the Oakland County Jail, approached her and discussions with her in which he told her that she should not plead guilty if she was not guilty.

7. Testimony at the hearing revealed that deputy Ott recommended his own attorney, Saunders Dorsey, to handle Ms. Titlow's case, stat8ing that he "had an attorney that was really good and could ask somebody to come talk to me."

8. Testimony at the hearing revealed that Deputy Ott's involvement set into motion a chain of events whereby Ms. Titlow's case was referred to attorney Frederick Toca, who encouraged her to reject the plea agreement to testify against the aunt.

9. Testimony at the hearing revealed that Mr. Toca provided a fee agreement whereby book/movie/television rights were transferred to the law firm in exchange for representing Ms. Titlow.

10. Testimony at the hearing revealed that attorney Toca withdrew from the case due to certain money for costs not being available and failure to get extensions in deadlines naming medical experts.

11. The result of the arbitration hearing was that was that the arbitrator found that the testimony of inmate Titlow was more credible than that of Deputy Ott, that key components of Deputy Ott's testimony was rendered suspect or proven to be inconsistent, and that Deputy Ott breached departmental rules and regulations. However these were found not to be of a

serious enough breach to warranty-dismissal and Deputy Ott's termination was reduced to a 60 day suspension without pay.

12. I am available to testify at a hearing as to my recollection of the testimony at the arbitration hearing based upon my notes and the arbitrator's award.

Further deponent saith not.

William Pierson
WILLIAM G. PIERSON

Subscribed and sworn to before me
this *25th* day of October, 2002.
Elaine G. McCracken
NOTARY PUBLIC

Oakland County, Michigan
My Commission Expires: 5/19/2004

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff-Appellee,

-vs- CoA No: 241285

VONLEE NICOLE TITLOW,
Defendant-Appellant
/

AFFIDAVIT OF RICHARD M. LUSTIG

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

RICHARD M. LUSTIG, being first duly sworn, deposes and states as follows:

1. That I am an attorney licensed to practice law in the State of Michigan.

2. That I represented the Appellant in case number 01-177745 from the date of the arraignment on the complaint until Frederick Toca substituted in as attorney of record on November 29, 2001.

3. That during that time, I entered into plea negotiations with the Oakland County Prosecutor's Office on behalf of the Appellant.

4. That the bargain I eventually obtained consisted of a guilty plea to manslaughter with a sentence of 7-

15 years. The bargain was conditioned upon Appellant passing a polygraph test and upon her testifying at trial against her aunt, Billie Rogers. A further condition was that the Appellant not raise on appeal the issue that the sentence exceeded the guideline range.

5. That based on my professional judgment, I believed that this plea was in the best interests of my client and I advised her to agree to the bargain.

6. That Mr. Toca did not pick up the discovery materials from my office, nor discuss the facts of the case with me until January 10, 2002 as evidenced by the attached, Acknowledgment of Receipt signed by Mr. Toca, although said file was made available to him on or about November 29, 2001, the time of his substitution.

FURTHER, DEPONENT SAYETH NOT.

Richard M. Lustig
RICHARD M. LUSTIG

Subscribed and sworn to before me
this *19th* day of November, 2002.
Charlene M. Bienenstock
CARLENE M. BIENENSTOCK Notary Public
Oakland County, Michigan
My Commission Expires: 6-25-03

{SIXTH CIRCUIT COURT OF APPEALS
No. 10-2488}

STATE OF MICHIGAN
Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,
Petitioner, Case Nos. 08-22-AI;
08-85-JC; 08-140-GA

v

FREDERICK M. TOCA, JR., P 56608,
Respondent.
_____/

ORDER AFFIRMING HEARING PANEL
ORDER OF REVOCATION
Issued by the Attorney Discipline Board
211 W. Fort St., Ste. 1410, Detroit, MI

The respondent, Frederick M. Toca, Jr., petitioned the Attorney Discipline Board for review of an order issued by Tri-County Hearing Panel #67 on January 5, 2010, revoking the respondent's license to practice law in Michigan, effective January 27, 2010. Respondent also requested a stay of discipline and a stay regarding payment of costs. The Board denied the motion to stay discipline but granted the motion to stay payment of costs pending the outcome of the Board's review. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, has considered the briefs and arguments submitted by the parties and is otherwise fully advised.

For the reasons stated in the attached opinion, we affirm the panel's order of revocation.

NOW THEREFORE,

IT IS ORDERED that the order of revocation issued by Tri-County Hearing Panel #67 on January 5, 2010, is **AFFIRMED**.

IT IS FURTHER ORDERED that respondent shall, on or before August 28, 2010, reimburse the Attorney Discipline Board for the court reporting and transcript costs in the amount of $113.00 incurred at the review hearing conducted on May 12, 2010. Such costs are in addition to the costs of $3,144.74 assessed by the hearing panel in its order of January 5, 2010, together with interest pursuant to MCR 9.128. Check or money order shall be made payable to the State Bar of Michigan but submitted to the Attorney Discipline Board [211 W. Fort St., Ste. 1410, Detroit, MI 48226] for proper crediting. (See enclosed instruction sheet.)

ATTORNEY DISCIPLINE BOARD
By: _____
Thomas G. Kienbaum, Vice-Chairperson
(w/ permission 7/30/2010)

Dated: July 30, 2010

Board members Thomas G. Kienbaum, William L. Matthews, C.P.A., Andrea L. Solak, Rosalind E. Griffin, M.D., Carl E. Ver Beek, Craig H. Lubben, James M. Cameron, Jr., and Sylvia P. Whitmer, Ph.D. concur in this decision.

Board member William J. Danhof was absent and did not participate.

STATE OF MICHIGAN
Attorney Discipline Board

Grievance Administrator,
Petitioner/Appellee,
v
Frederick M. Toca, Jr., P 56608,
Respondent/Appellant,
Case Nos. 08-22-AI; 08-85-JC; 08-140-GA
Decided: July 29, 2010

Appearances:

Cynthia C. Bullington, for the Grievance Administrator, Petitioner/Appellee

Donald D. Campbell, for the Respondent/Appellant

BOARD OPINION

This proceeding was commenced by the filing of various judgments of conviction as well as a formal complaint. The hearing panel entered an order of revocation. Respondent has petitioned for review. We affirm.

On March 6, 2008, the Attorney Discipline Board issued a Notice of Automatic Interim Suspension based on respondent's felony conviction for forgery of license documents/plates on February 22, 2008. A Notice of Filing of Judgment of Conviction was filed with this Board on June 18, 2008, by the Grievance Administrator, and an Amended Notice of Filing of Judgments of Convictions was filed on September 30, 2008. The amended notice stated that respondent was convicted of driving while license suspended, and a

forgery of license documents, misdemeanors, in violation of MCL 257.904(1)(C) and MCR 257.324 in the 47th District Court. The amended notice also stated that respondent was convicted, on May 6, 2008, for forgery of license documents, a felony, in violation of MCL 257.257, in the Oakland County Circuit Court. Finally, the amended notice stated that respondent was convicted on July 2, 2008, for no valid license in possession, a misdemeanor, in the 46th Judicial District Court.

The Grievance Administrator also filed Formal Complaint 08-140-GA alleging that respondent's conduct with respect to the execution, notarization, and filing of five affidavits in a Wayne Circuit case and a subsequent appeal violated MRPC 8.4(a)-(c) and MCR 9.1 04(A)(l)-(3). Two affidavits were purportedly signed by police officer Ata Dabish and notarized by Nicole Davis. The remaining three affidavits, from affiants Willie Parker, Gregory Thrift, and Michael Brown, were purportedly notarized by David Canine.

Formal Complaint 08-140-GA was consolidated for hearing with Case Nos. 08-22-AI and 08-85-JC, and the respondent's default for failure to file an answer to the formal complaint was filed with the Board on October 31, 2008. Respondent moved to set aside the default, which motion was denied by the hearing panel on February 24, 2009, for the reasons that respondent had shown neither good cause nor a meritorious defense to the charges. See MCR 2.603 (D)(1). This Board denied respondent's petition for interlocutory review of the panel's decision because an abuse of the panel's discretion had not been shown. Respondent then filed an application for leave to appeal with the Michigan

Supreme Court. which was denied by the Court on June 3, 2009, because "respondent has not been aggrieved 'by a final order of discipline or dismissal' entered by the Attorney Discipline Board. MCR 9.122(A)(1)." *Grievance Administrator v Frederick M. Toca, Jr.*, 765 NW2d 612 (Mich, 2009).*

Following the interlocutory appellate proceedings, a renewed motion to set aside the default was denied by the panel and the hearing on discipline was held. The panel allowed respondent's counsel to present evidence in mitigation, including the report of a handwriting analyst which opined that the notary's signature on the Parker and Thrift affidavits "were written by the same person," i.e., Mr. David Canine. As to the Brown affidavit, however, the original could not be examined and the analyst could only state that the notary's signature was "highly probably written" by Mr. Canine. Counsel for the Grievance Administrator voluntarily dismissed the allegations regarding those two affidavits, but the allegations regarding the Brown affidavit and the two Dabish affidavits remained.†

---

* Supreme Court Docket No. 138947.

† Notwithstanding the fact that the default had not been set aside despite several attempts, the Administrator stipulated to the dismissal of paragraphs 9, and 15(c) and (d) of the formal complaint. See Stipulation, Respondent's Ex A (at 11/6/09 hearing on discipline). Paragraph 9 of the formal complaint alleges that "Attorney David Canine maintained offices across the hall from Respondent in a shared suite in April of 2006, but he did not notarize the aforementioned affidavits for Parker, Thrift, *and Brown*" (emphasis added). Although the stipulation does not encompass dismissal of the allegation in paragraph 15(e) of the formal complaint that the Brown affidavit "was never signed or notarized by Attorney Canine as the document purports," we will

After the hearing on discipline, the hearing panel issued its order revoking respondent's license to practice law, commencing January 27, 2010.

Respondent raises four issues in his petition for review and brief in support. First, respondent argues that the default was improper because it was not entered by a court clerk as required by MCR 2.603(A)(1). We find no error requiring reversal. Except as otherwise provided in subchapter 9.100 of the Michigan Court Rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel. MCR 9.115(A). Subchapter 9.100 provides that: "A default, with the same effect as a default in a civil action, may enter against a respondent who fails within the time permitted to file an answer admitting, denying, or explaining the complaint or asserting grounds for failing to do so." MCR 9.115(D)(2). We are not persuaded that the proceedings are invalid unless either a court clerk (or, analogizing, ADB personnel) actually perform an action denominated "entry of default." Nor are we convinced that respondent has been prejudiced by any action in these proceedings. Respondent's failure to answer or otherwise defend is not contested. Whether AGC counsel purports to enter the default by the filing of a document so captioned, or counsel submits a notice to the "ADB and entry immediately follows receipt, is of no practical

---

presume that the hearing panel did not include the allegations regarding the Brown affidavit among the misconduct for which discipline was imposed. In any event, we decide this matter as if these allegations were not established by default or otherwise and are not part of the misconduct for which discipline was imposed.

significance. In either case, a respondent would have no opportunity to act until the default is set aside. Even if there were error here, we would find no basis for reversal MCR 9.102(A) (subchapter 9.100 is to be liberally construed for the protection of the public.); MCR 9.107(A) (a proceeding under subchapter 9.100 may not be held invalid because of a nonprejudicial irregularity or an error not resulting in a miscarriage of justice).

Next, respondent argues that the hearing panel abused its discretion by not setting aside the default. We disagree.

Except when grounded on lack of jurisdiction, a motion to set aside a default shall be granted only if good cause is shown and an affidavit of facts is filed. MCR 2.603(D)(1). A hearing panel's decision to grant or deny a motion to set aside a default is committed to the panel's discretion, but there must be a sufficient showing as to both good cause and a meritorious defense. *Grievance Administrator v Clyde Ritchie*, ADB 52-87 (ADB 1988) (panel's decision to set aside default reversed where showing of good cause not shown). See also *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229 (1999) (disapproving of the Court of Appeals' "'blurring" of the two requirements and reinstating trial court's denial of motion to set aside default). However, "if a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were weaker, in order to prevent a manifest injustice." *Alken-Ziegler*, 461 Mich at 223-224.

A hearing panel's decision whether to set aside a default will not be disturbed absent an abuse of

discretion. *Grievance Administrator v Simon, et. at.*, 02-83-GA (ADB 2003) (Citing *Alken-Ziegler, supra*, and emphasizing deference owed to panel's determination). As the Court stated, "Where there has been a valid exercise of discretion, appellate review is sharply limited." *Alken-Ziegler*, 461 Mich at 228.

Respondent's explanation for failing to answer the formal complaint is that he confused an answer to the formal complaint with a request for investigation. In other words, he thought his answer to the request for investigation during the pre-formal complaint investigation by the AGC relieved him of responsibility to answer the allegations in the formal complaint filed with the Board and served on him. The panel was certainly not required to credit this argument even if this had been respondent's first formal case. However, we also note that respondent has been a party to other disciplinary actions wherein he received requests for investigations and formal complaints and he is therefore familiar with the appearance of such documents, as well as his duties under MCR 9.115(D)(1). In fact, prior to the instant case, respondent had been served (and timely answered) two separate formal complaints within the last six years.

In addition to a showing of good cause, respondent was required to submit "an affidavit of facts showing a meritorious defense." MCR 2.603(D)(1). The hearing panel considered respondent's affidavit in support of his motion to set aside default stating that "all of the evidence in this matter proves that all affidavits submitted in this matter were properly executed and sworn to as indicated by those who submitted same." The panel also reviewed various documents attached to

the motions. Most of respondent's arguments have focused on the affidavits of Parker, Thrift, and Brown. As we have noted above, we consider the formal complaint's allegations regarding the Dabish affidavits to be the only ones not disposed of at this stage. After a careful review of the record and respondent's arguments, we find no basis to conclude that the panel's decision not to set aside the default constitutes an abuse of discretion.

Additionally, at the hearing on discipline, the panel was very liberal in allowing respondent to present evidence in mitigation:

> Mr. Chairman:
>
> The panelists have taken a moment. The panel is well aware there's a default entered in the inquiry. Our ruling is that the Grievance Administrator is seeking revocation. And that the panel, if it's going to err, its' going to err perhaps on the liberal side in terms of allowing the respondent to provide mitigating information. So we're going to allow the examination to continue. [Tr 11/06/09, p 85.]

We note that evidence at the hearing on discipline, including respondent's testimony, certainly does not establish that allowing the default to stand as to the allegations regarding the Dabish affidavits amounts to a miscarriage of justice.

The third issued raised by respondent is that the level of discipline is excessive in light of the misconduct. Upon review of the nature of the charged misconduct, it appears fairly obvious that revocation

was the appropriate level of discipline. Respondent testified that, while his license was suspended, he received in the mail the license tabs belonging to the previous owner of his home. He intentionally placed the license plate tabs on his motor vehicle, drove on a suspended license, and then misrepresented his identity to the traffic officer who pulled him over. Respondent candidly admitted that he gave the officer a false name in all effort to avoid detection. As the panel found:

> Here, respondent has violated duties owed to the public by committing criminal acts reflecting adversely on his honesty, trustworthiness or fitness as a lawyer, and for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by submitting false affidavits to the trial and appellate courts. See ABA Standard 5.1. Notably, with respect to respondents criminal acts, there is no question and/or dispute that respondent acted intentionally and knowingly when he placed false license plate tabs on his motor vehicle and proceeded to drive on a suspended driver's license. Indeed, and most disconcerting, respondent admitted that he placed the false tabs on his motor vehicle "because [he] didn't think [he] was going to get caught." (Tr 11/6/09, p 51.) [HP Report, p 3; emphasis in original]

In addition to the misconduct relating to the Dabish affidavits established by the default with respect to Formal Complaint 08-140-GA, this case also presents several convictions involving dishonest

conduct. Respondent's previous misconduct includes holding himself out as an attorney before admission to the Michigan bar, entering into a fee agreement wherein he improperly acquired literary or media rights related to his client's criminal matter, misleading advertising, and commingling and conversion of client funds. Given the number and nature of these and other aggravating factors identified by the panel, and the multiple instances of misconduct here, we find no reason to disagree with the panel's conclusion that revocation of respondent's license to practice law in Michigan is the appropriate sanction to be imposed in order to protect the public, the courts, and the profession.

Respondent's final claim of error is that the panel ordered that the commencement date of respondent's revocation to begin January 27, 2010, which is 21 days after the entry of the order of revocation, instead of making the commencement date retroactive to February 22, 2008, the date of respondent's conviction. MCR 9.115(J)(3) provides that a discipline order "shall take effect 21 days after it is served on the respondent unless the panel finds good cause for the order to take effect on a different date, in which event the panel's decision must explain the reasons for ordering a different effective date." Pursuant to MCR 9.120(B)(I), a lawyer convicted of a felony is automatically suspended by operation of law "until the effective date of an order filed by a hearing panel under MCR 9.115(1)," i.e., until a hearing is concluded and discipline is ordered.

Respondent was convicted of the felony charge of forgery/alteration regarding license plate tabs on

February 22, 2008, and has been continuously suspended since that time. Respondent was then suspended for two years in case # 06-85-GA pursuant to an order effective April 11, 2008. Respondent argues that the panel ignored a practice of the Board and other panels to order that, in cases involving felony convictions, the effective date of an order of suspension be the date of an automatic interim suspension pursuant to MCR 9.120(B)(1). This is a reasonable and fair result when a lawyer is automatically removed from practice pending adjudication and is not subject to an overlapping suspension in an unrelated case. However, in this case respondent was suspended in another matter shortly after his automatic suspension resulting from the felony conviction. We cannot find that the hearing panel's adherence to MCR 9.115(J)(3)'s terms is erroneous or unfair under the circumstances of this case.

Board members Thomas G. Kienbaum, William L. Matthews, C.P.A., Andrea L. Solak, Rosalind E. Griffin, M.D., Carl E. Ver Beek, Craig H. Lubben, James M. Cameron, Jr., and Sylvia P. Whitmer, Ph.D. concur in this decision.

Board member William J. Danhof was absent and did not participate.

Concurrence - Thomas G. Kienbaum, Vice-Chairperson:

I fully concur in all aspects of our decision. I write separately only to emphasize that while I believe the public and profession are best protected by having disciplinary matters ordinarily adjudicated on the

merits, on the facts of this case, the panel's decision not to set the default aside is properly affirmed.

While MCR 2.603(D)(1) does not distinguish between defaults in "major" and "minor" cases, it is inevitable that where, as here, the equivalent of "bet the company" is presented, the meritorious defense factor will be closely scrutinized, perhaps with a more lenient eye towards the "good cause" factor. Our principal opinion in this case, citing *Alken-Ziegler*, 461 Mich at 223-224, recognizes this.

At first glance the fact that a default was entered, and not set aside, may appear troubling. Respondent was defaulted some nine days after his answer to the formal complaint was due. Within five days of being defaulted, he contacted the Administrator and explained his mistaken belief that he had answered and re-sent his answer to the request for investigation. Thereafter, he appeared in order to vigorously defend. Ordinarily prosecutorial discretion would seem to warrant addressing the merits of a complaint seeking revocation of one's license where respondent answers a mere nine days late, and at least tries to articulate a reason for being late, even if this might not constitute sufficient "good cause."

As a consequence we scrutinized the record with particular care.

As an initial matter no defense, let alone a meritorious defense, was or could have been offered in rebuttal to the three criminal convictions - two misdemeanors and one felony. With respect to the affidavits claimed to have been fraudulently verified, no meritorious defense was proffered as to two of the

five. These instances of essentially uncontested misconduct formed the basis of the panel's order, and our affirmance. Given the misconduct, disbarment was within the applicable standards under which we must operate.

Additionally the panel, as we noted, gave respondent leeway in providing evidence that might more appropriately have pertained to the underlying merits, rather than mitigation. Finally, counsel for the Grievance Administrator did evaluate Respondent's proffered evidence after default, and agreed to dismiss allegations pertaining to some of the affidavits.

Respondent simply was not able to articulate a meritorious defense as to charges warranting disbarment, even if we had given him the benefit of the doubt on the "good cause" factor under the Rule. Accordingly, although I might be more receptive to the argument that a case involving presumptively disbarment-level misconduct should be resolved after a full hearing on the merits, respondent has had the opportunity to make a record as to his defenses and we find no abuse of discretion and certainly no miscarriage of justice in allowing the default to stand and affirming the panel's imposition of disbarment in this case.

NOTICE OF REPRIMAND WITH CONDITIONS
(By Consent)
Case No. 04-79-GA
Notice Issued: January 25, 2005

Frederick M. Toca, Jr., P 56608, Pontiac, Michigan by the Attorney Discipline Board Tri-County Hearing Panel #76.

1. Reprimand

2. Effective January 25, 2005

The respondent and the Grievance Administrator filed a stipulation for a consent order of discipline, in accordance with MCR 9.115(F)(5), containing respondent's plea of no contest to the allegations that, in a real estate matter, he failed to appear for hearings without timely seeking adjournments from the court, causing his clients' case to be dismissed; failed to notify his clients of hearing dates or adjournments; and failed to notify his clients that the case had been dismissed.

Respondent also pled no contest to the allegations that his advertisement for legal services was materially misleading ("expert in criminal defense"); compared his services with other lawyer's services without factual substantiation ("best criminal defense in Michigan"); and implied that he can achieve results by means that violate the Rules of Professional Conduct (stated that he had a former prosecutor on staff who could provide an "inside advantage," thereby implying undue influence and improper advantage in the judicial system).

Respondent was charged with violations of MCR 9.104(A)(1)-(4); and Michigan Rules of Professional Conduct 1.1(c); 1.2(a); 1.3; 1.4(a) and (b); 3.2; 7.1 (a)-(c); and 8.4(a) and (c). The parties agreed that respondent should be reprimanded and be subject to conditions relevant to the alleged misconduct. Costs were assessed in the amount of $797.68.

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

THE PEOPLE OF THE STATE OF MICHIGAN,

v Case No. 01-177745-FC

VONLEE NICOLE TITLOW,

Defendant. /

PLEA HEARING
BEFORE THE HONORABLE WENDY POTTS
Pontiac, Michigan Wednesday, October 31, 2012

APPEARANCES:

For the People: JOHN M. SKRZYNSKI (P33013)
Oakland County Prosecutor's Office
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 858-0656

For the Defendant:
LAURA KATHLEEN SUTTON (P40775)
P.O. Box 388
Manchester, Michigan 48158
(734) 428-7445

Also Present: JOHN S. PALLAS (P42512)
Assistant Attorney General
525 West Ottawa Street
Lansing, Michigan 48909
(517) 373-4875

Transcription by: Sandra Traskos, CER 7118
Accurate Transcript Services
(734) 944-5818

* * *

[Page 14]

MS. SUTTON: Your Honor?

THE COURT: Yes.

MS. SUTTON: May the record reflect I have had the opportunity to consult with my client. My client has indicated to me that she has no objection to you taking it under advisement, that she's willing to accept the plea proffered today.

THE COURT: Excellent. Okay, so I will take it under advisement so everybody knows I won't accept the plea today, but I will take the plea right now.

MR. SKRZYNSKI: Judge, let me offer the plea first--

THE COURT: Yes.

MR. SKRZYNSKI: --just so we make sure the mandate is tolled. Pursuant to the Sixth Circuit order, the People are reoffering the plea of reducing the charge of first degree premeditated murder to manslaughter with a sentence recommendation of seven to 15 years in exchange for the defendant's testimony at trial against her aunt and truthful testimony given at trial. That's -- I believe that was the original offer that we were requested and mandated to make, so that's the -- that's the quid pro quo. In exchange for the testimony against her aunt, the

People are offering manslaughter and seven to 10 -- seven 24 to 15.

* * *

[Page 19]

THE COURT: Has anyone threatened you to get you to plead guilty?

THE DEFENDANT: No.

THE COURT: Is this your own choice to plead guilty?

THE DEFENDANT: Yes, ma'am.

THE COURT: In what city did this offense occur?

THE DEFENDANT: Troy.

THE COURT: Tell me what you did August 12th, 2000, that makes you think you're guilty of manslaughter?

THE DEFENDANT: In a reckless and dangerous harmful way I put a -- Donald Roger's life in great bodily harm, possibly death, by -- I applied a shot of vodka down -- in his mouth which ultimately led to my aunt taking his life.

THE COURT: Mr. Skrzynski, are you satisfied with the factual basis?

MR. SKRZYNSKI: Well, actually no. I don't think that that is an adequate basis and I don't think that's what the facts are in this case. I don't think that's what the facts were at the trial which I proved beyond a

reasonable doubt ten years ago. And, I think that there was more to this.

MS. SUTTON: That's what Mr. Skremanski (sic) accepted.

[Page 20]
MS. SKRZYNSKI: Skrzynski.

MS. SUTTON: Skrzynski, excuse me. Skrzynski accepted at the original plea taking.

THE COURT: Ms. Titlow, I sat through the trial and I'm going to need more than that for a factual basis. You know this is being offered to you, just tell what happened.

THE DEFENDANT: What happened was Donald Rogers is my aunt's husband. And, he was a chronic alcoholic and they drank all time and they had a lot of problems. And, he was drinking and he passed out. And, then I tried to wake him up and I tried to get him up to get him to bed and then she came over and she started pouring alcohol down his throat and she was trying to get me to help her. And, I had been drinking a lot myself so I really wasn't thinking, you know. Then when I realized what she was doing, I didn't think she was going to really kill him, but I thought she might hurt him so I took the bottle of vodka away from her and I told her, I said stop. I said you're going to end up hurting him. So, I went to the bathroom and when I came back she had a pillow over his face. Now, I -- I don't -- I mean I --

THE COURT: Did you assist in killing him?

THE DEFENDANT: No and I passed a polygraph test to this. And, they asked me all these questions. And, in

[Page 21]
agreement to be able to testify to the truth of my aunt --

THE COURT: Did you pour alcohol down his throat?

THE DEFENDANT: I poured it in his mouth.

THE COURT: Was he passed out?

THE DEFENDANT: Yes. Yes, he was.

MR. SKRZYNSKI: Your Honor, if I may voir dire for a second?

THE COURT: Yes.

MR. SKRZYNSKI: Did you then place your hand over his mouth?

THE DEFENDANT: I never held my hand over his mouth. I was putting my hand like that but I never closed my hand over his mouth. I never --

MR. SKRZYNSKI: Didn't you -- didn't you and your aunt agree, and you knew that your aunt was trying to kill your uncle?

THE DEFENDANT: No, and you know I passed the polygraph test to that. Didn't you ask me that in a polygraph test?

MR. SKRZYNSKI: And, you agreed -- you agreed to help her for the money that you later received and the car you later received?

THE DEFENDANT: No, I received the money not to say anything.

MR. SKRZYNSKI: Judge, I'm not going to argue

[Page 22]
with her. If she wants to plead let her plead guilty.

THE COURT: I need to get a factual basis to even--

THE DEFENDANT: Your Honor, I passed the polygraph test. All these things, he was there when I passed the polygraph test.

THE COURT: I just want to make sure I get a factual basis.

MS. SUTTON: You need to tell the Court, did you accept compensation from Billy Rogers?

THE DEFENDANT: Yes, I did. I did accept --

THE COURT: In order to assist in the killing of Donald Rogers?

THE DEFENDANT: No, it was afterwards. Afterwards I threatened to call 911. And, then she offered me money not to.

THE COURT: Did you assist in killing him?

THE DEFENDANT: No. I don't feel that I -- I did not hold the pillow over his face. No, I did not assist in

killing him. I did pour a shot of vodka in his mouth. That is it. That is all I did.

MS. SUTTON: Did that lead to death?

THE DEFENDANT: Yes, it did lead to his death.

THE COURT: Did it put him in --

THE DEFENDANT: It put him in great bodily harm -

[Page 23]
THE COURT: Because he was passed out and he was drunk and alcoholic?

THE DEFENDANT: It led to his death, yes it did.

THE COURT: It allowed her to go get the pillow and put it over his face?

THE DEFENDANT: It put him in a position, yes, to lead to it.

THE COURT: And, you knew that was a possibility that she would be doing something further to --

THE DEFENDANT: No, I did not.

MS. SUTTON: Nothing further?

THE COURT: You had no idea she was going to be doing anything else when you poured the vodka down his mouth?

THE DEFENDANT: No, I did not.

THE COURT: You thought that was it?

THE DEFENDANT: I took the vodka away from her, went to the bathroom, and then we was going to -- I thought she -- I figured she would leave him alone, and when I came back out she had a pillow over his face.

THE COURT: Do you want to voir dire your client at all?

MS. SUTTON: I do want to consult with my client briefly and then possibly do another voir dire. If I

[Page 24]
might have a couple minutes.

THE COURT: Okay, you can have a couple minutes.

MS. SUTTON: We're ready.

THE COURT: All right.

THE DEFENDANT: Yes, Your Honor. I mean yes I did -- I did put him in a position to be reckless --

THE COURT: To die?

THE DEFENDANT: To die, I did, by pouring the shot of alcohol in his mouth. It led to his death. It is what --

THE COURT: And, you knew that was a possibility?

THE DEFENDANT: Yes, ma'am.

THE COURT: Are you satisfied with the factual basis Mr. Skrzynski?

MR. SKRZYNSKI: Well, I just want to point out, Judge, if I may, at page ve of this -- of the Sixth Circuit's opinion, the court states -- the court states, at trial Titlow took the stand in her own defense. She admitted to putting her hand over Donald's mouth after Billy poured vodka down his throat. I -- I remember her saying that so now she's --

THE DEFENDANT: I did --

MR. SKRZYNSKI: -- denying it.

THE COURT: You did what?

THE DEFENDANT: I did place my hand on his mouth

[Page 25]
like --

MS. SKRZYNSKI: Just a minute ago she denied it. If she's admitting it --

THE COURT: All right --

THE DEFENDANT: No, no, no. I'm saying I did not put it closed handed but I did --

THE COURT: You put your hand over his mouth after you poured vodka?

THE DEFENDANT: Right. My aunt was encouraging me to. So, I did.

THE COURT: You did it?

THE DEFENDANT: Yes, ma'am.

THE COURT: Are you satisfied?

MS. SUTTON: I'm satisfied.

MR. SKRZYNSKI: Well, the Court may -- if the Court's satisfied then I'm --

THE COURT: All right, I am not at this time accepting the plea. I have the factual basis that you've described and I'm going to set the matter for making a decision on whether to accept the plea and/or to sentence. So, I do want a pre-sentence report done. And, we'll set that February 27th.

MR. SKRZYNSKI: What time Judge?

THE COURT: Let me just see one thing. Just one second. One minute.

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 12-414

In the Supreme Court of the United States

SHERRY L. BURT, PETITIONER

v.

VONLEE TITLOW

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

Bill Schuette
Michigan Attorney General

B. Eric Restuccia
Deputy Solicitor General

John J. Bursch
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

Aaron D. Lindstrom
Asst. Solicitor General

Raina Korbakis
Asst. Attorney General
Appellate Division

Attorneys for Petitioner

Library of Congress

QUESTIONS PRESENTED

1. Whether the Sixth Circuit failed to give appropriate AEDPA deference to a Michigan state court by holding that defense counsel was constitutionally ineffective for allowing Respondent to maintain his claim of innocence.

2. Whether a convicted defendant's subjective testimony that he would have accepted a plea but for ineffective assistance, is, standing alone, sufficient to demonstrate a reasonable probability that defendant would have accepted the plea.

3. Whether *Lafler* always requires a state trial court to resentence a defendant who shows a reasonable probability that he would have accepted a plea offer but for ineffective assistance, and to do so in such a way as to "remedy" the violation of the defendant's constitutional right, or merely requires a re-offer of the plea.

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the opinion. The Petitioner is Sherry Burt, Warden of a Michigan correctional facility. The Respondent is Vonlee Titlow, an inmate.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Statutory Provisions Involved 2

Introduction 3

Statement of the Case 5

A. Death by "Burking" 5

B. Titlow accepts a plea offer. 6

C. Titlow maintains his innocence, hires new counsel, and withdraws his plea 10

D. The trial 12

E. State court proceedings 18

F. Federal habeas corpus proceedings 18

G. The re-offered plea 21

Summary of Argument 23

Argument 26

I. The Sixth Circuit failed to give appropriate AEDPA deference to the Michigan Court of Appeals' decision. 26

A. The Michigan Court of Appeals did not unreasonably determine the facts. 28

B. The Michigan Court of Appeals' legal conclusion was not contrary to or an unreasonable application of this Court's clearly established precedent. 30

C. Titlow has presented no evidence that he lacked any pertinent information when he withdrew his plea, or that Toca gave him deficient advice. 33

D. Titlow has also not demonstrated that Toca's failure to review Lustig's file would have changed Titlow's decision to withdraw his plea. 37

II. A state prisoner who seeks to reclaim a rejected plea must produce objective evidence that he would have accepted the plea but for ineffective assistance..... 39

III. *Lafler* does not require a state trial court to resentence or otherwise "remedy" the purported constitutional violation. 46

A. The Sixth Circuit erroneously created an entirely new scheme for fashioning a *Lafler* remedy. 46

B. The trial could, in its discretion, leave undisturbed Titlow's trial conviction and sentence. 48

Conclusion 52

TABLE OF AUTHORITIES

Page

Cases

Bachicha v. *Shanks*,
66 F.3d 338, 1995 WL 539467 (10th Cir. Aug. 31, 1995) 41

Brown v. *Attorney Gen. of Cal.*,
292 F. App'x 674 (9th Cir. Sept. 11, 2008) 37

Cooper v. *Lafler*,
376 F. App'x 563 (6th Cir. 2010) 42

Cullen v. *Pinholster*,
131 S. Ct. 1388 (2011) 27

Deiterman v. *Kansas*,
291 F. App'x 153 (10th Cir. Aug. 27, 2008) 37

Diaz v. *United States*,
930 F.2d 832 (11th Cir. 1991) 41

Dickerson v. *Bagley*,
453 F.3d 690 (6th Cir. 2006) 25

Florida v. *Nixon*,
543 U.S. 175 (2004) 3, 31

Griffin v. *United States*,
330 F.3d 733 (6th Cir. 2003) 41

Harrington v. *Richter*,
131 S. Ct. 770 (2011) 3, 23, 27, 36

In re Guilty Plea Cases,
235 N.W. 132 (Mich. 1975) 32

Johnson v. *Williams*,
133 S. Ct. 1088 (2013) 23

Jones v. *United States*,
2012 WL 5382950 (6th Cir. Nov. 5, 2012) 51

Lafler v. *Cooper*,
132 S. Ct. 1376 (2012) ..... passim

Maldonato v. *Archuleta*,
61 F. App'x 524, 2003 WL 361303 (10th Cir. Feb. 20, 2003) 41

Merzbacher v. *Shearin*,
706 F.3d 356 (4th Cir. 2013) 43

Metrish v. *Lancaster*,
133 S. Ct. 1781 (2013) 23

Missouri v. *Frye*,
132 S. Ct. 1399 (2012) 48, 51

Moses v. *United States*,
175 F.3d 1025, 1999 WL 195675 (8th Cir. 1999)..... 41

North Carolina v. *Alford*,
400 U.S. 25 (1970) 31, 32, 43

Padilla v. *Kentucky*,
130 S. Ct. 1473 (2010) 27, 36

Paters v. *United States*,
159 F.3d 1043 (7th Cir. 1998) 41

People v. *Ginther*,
212 N.W.2d 922 (Mich. 1973)..... 34

People v. *Haack*,
240 N.W.2d 704 (Mich. 1976)..... 32

People v. *Lowe*,
773 N.W.2d 1 (Mich. 2009)..... 8

Smith v. *United States*,
348 F.3d 545 (6th Cir. 2003) 41

Strickland v. *Washington*,
466 U.S. 668 (1984) ..... passim

Toro v. *Fairman*,
940 F.2d 1065 (7th Cir. 1991) 41

United States v. *Gordon*,
156 F.3d 376 (2d Cir. 1998) 41

United States v. *Morris*,
106 F. App'x 656, 2004 WL 1598792, (10th Cir. July 19, 2004) 41

United States v. *Stevens*,
149 F.3d 747 (8th Cir. 1998) 45

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2241 *et seq*..... passim

28 U.S.C. § 2254(d)(1) 23, 26

28 U.S.C. § 2254(d)(2) 23, 26, 28, 29

28 U.S.C. § 2254(e)(1) 23, 30, 34

Mich. Comp. Laws § 777.64 11

Mich. Comp. Laws § 791.234(1) 8

Mich. Comp. Laws Ann. § 768.35 31

Other Authorities

Jenny Elayne Ronis *The Pragmatic Plea: Expanding Use of the Alford Plea to Promote Traditionally Conflicting Interests of the Criminal Justice System*, 82 TEMP. L. REV. 1389 (Spring-Summer 2010) 31

Rules

ABA Model Rules of Prof'l Conduct R. 1.2(a) 31

Mich. Ct. R. 6.302(D)(1) 32

Mich. Ct. Rule 6.302(C)(3) 47

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals, Pet. App. 1a–32a, is reported at 680 F.3d 577. The opinion of the district court, Pet. App. 34a–97a, is not reported but is available at 2010 WL 4115410. The opinion of the Michigan Court of Appeals, Pet. App. 98a–119a, is not reported but is available at 2003 WL 22928815.

JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on May 22, 2012. Pet. App. 33a. A petition for rehearing was denied on August 2, 2012. Pet. App. 121a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 *et seq.*), provides in § 2254:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

INTRODUCTION

A jury convicted Respondent Vonlee Titlow of second-degree murder.[1] Titlow now claims that his second attorney was ineffective for allowing Titlow to maintain his innocence and withdraw a manslaughter plea (negotiated by his first attorney), despite the fact that Titlow hired his second attorney to do exactly that. The Sixth Circuit held that the Michigan Court of Appeals unreasonably denied Titlow's ineffective-assistance claim, and it ordered the prosecutor to re-offer the plea and the state trial court to resentence Titlow. The Sixth Circuit erred in three fundamental ways.

First, the Sixth Circuit misapplied AEDPA deference to the state-court decision. Titlow has conceded the Michigan Court of Appeals' key factual finding: that his second attorney's advice was set in motion by Titlow's claim of innocence. And the Michigan Court of Appeals' legal conclusion was consistent with—not contrary to or a misapplication of—this Court's clearly established precedent that a defendant retains "the ultimate authority" whether to plead guilty. *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004). Because the Michigan Court of Appeals' decision did not represent an "extreme malfunction," *Harrington* v. *Richter*, 131 S. Ct. 770, 786 (2011) (citation omitted), AEDPA prohibited the Sixth Circuit from setting aside Titlow's valid, state-court murder conviction.

---

[1] Titlow is a transgender male who is housed in an all-male prison facility. The lower court opinions use a combination of male and female pronouns when referring to Titlow, but for consistency, this brief will use male pronouns only.

Second, the Sixth Circuit erred in concluding that Titlow would have preserved his plea deal but for ineffective assistance. There is no record evidence to that effect, only Titlow's self-serving, post-trial litigation assertions. Such assertions are insufficient to warrant setting aside a constitutionally fair trial, which is why the majority of circuits require objective evidence of a defendant's pre-trial intent to accept a plea deal. Titlow's credibility is also weakened by the fact that he has not even alleged that his plea withdrawal stemmed from a lack of pertinent information or his attorney's failure to advise. Nor could Titlow make those allegations, given that his first attorney had discussed all of the evidence and trial risks with Titlow less than one month earlier.

Third, the Sixth Circuit changed the applicable remedy this Court established in *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012). When a defendant claims that he rejected a plea offer based on counsel's bad advice and is then convicted of a more serious charge, his remedy is an order compelling the prosecutor to re-offer the plea. If the defendant accepts the offer, the state trial court has discretion to either vacate the post-trial sentence or simply leave it in place. *Id.* at 1389. But here, the Sixth Circuit believed that simply reinstating Titlow's current sentence could render the *Lafler* remedy illusory. So the court erroneously suggested that the state trial court "fashion" a new sentence using the plea-bargain sentence as a baseline. Pet. App. 24a–25a. Not so.

For all these reasons, the State of Michigan respectfully requests that this Court reverse the Sixth Circuit's grant of habeas relief to Titlow.

STATEMENT OF THE CASE

A. Death by "Burking"

Vonlee Titlow's murder conviction stems from his role in the death by "Burking" of his elderly, wealthy uncle, Donald Rogers.

The term Burking comes from a series of grisly killings by Messrs. Burke and Hare in 19th century Edinburgh. J.A. 230. Burke and Hare were grave snatchers; they would exhume the bodies of the recently buried and sell the cadavers to the anatomy department at the University of Edinburgh in Scotland. J.A. 230. Then Burke and Hare had an epiphany: rather than doing all that digging, it would be much easier to inebriate local drunkards to a state of unconsciousness and then cover the victim's nose and mouth, resulting in an essentially undetectable asphyxiation. J.A. 230–31. But Burke and Hare overplayed their hand; a surplus of cadavers resulted in a criminal investigation that consigned Burke and Hare to prison and placed their criminal innovation in the history books. J.A. 231.

Here, a jury convicted Titlow of second-degree murder for assisting his aunt, Billie Rogers, in killing his uncle, whose cause of death was "asphyxia by smothering" with "acute alcohol intoxication" as a contributing factor. J.A. 196. To understand Titlow's ineffective-assistance claim, the evidence of Titlow's role in Rogers' death must be considered at two discrete points in time: (1) the evidence available to Titlow's second attorney when he assisted Titlow in withdrawing his manslaughter plea, and (2) the evidence before the jury when it convicted Titlow.

B. Titlow accepts a plea offer.

In the early morning of August 12, 2000, police officers were dispatched to the Rogers' residence, where they found Don dead on the kitchen floor. J.A. 90–92. There was a plastic cup by his hand, an overturned chair by his head, and his legs were crossed. J.A. 93–98. Don's wife, Billie, told officers that Don was a chronic alcoholic and sometimes passed out, J.A. 100–01, and that she and Titlow discovered him on the floor after returning from the casino. J.A. 100.

Some of the first responders were suspicious; Don's body position—he was lying flat on his back with his legs crossed at the ankles, with "one arm up, one arm down"—was unusual. J.A. 121–22, 125–27. Still, the body exhibited no obvious signs of trauma, J.A. 129, and the coroner listed a heart attack on the death certificate as the cause of death. J.A. 184.

Eighteen days later, events took a dramatic turn. Danny Chahine, whom Titlow had been dating, appeared unexpectedly at the police station and gave a videotaped interview indicating his belief that Titlow and Billie had a role in Don's death. J.A. 3–17. Chahine had become suspicious because, a couple of days before Don died, Titlow told Chahine about Billie "jokingly" offering to pay Titlow $25,000 to get rid of Don. J.A. 4.

In the week following Don's death, Titlow and Chahine got together. Titlow was drinking heavily and was very upset. J.A. 8. Titlow told Chahine that when Titlow and Billie arrived home from the casino on August 12, Don was not yet dead. J.A. 8. Billie

and Titlow began pouring vodka in Don's mouth and nose and took turns putting their hands over Don's nose. J.A. 9–11. Whenever Don needed a breath, Titlow let go. J.A. 11. But then Billie took a pillow from the living room and put it over Don's head. J.A. 12. Although Titlow insisted that it was Billie who suffocated Don, J.A. 12–14, Titlow was full of remorse for having participated in the vodka pouring, lamenting that "they killed him." J.A. 15.

At the police department's request, Chahine wore a wire when he met Titlow for drinks two days later. J.A. 18–32. On the audiotape, Titlow reiterated that Billie, not he, had killed Don: "I know she got a pillow over his face. . . . She's the one that poured the Vodka in his mouth. She did most everything and she even told me, she said, 'I did all the work'. . . . 'Cause I [Titlow] couldn't do it. Just couldn't." J.A. 18–19. But Titlow continued to express regret: "I felt so bad about what happened . . . . I feel guilty for killing him. . . . I think [God] knows that what happened to me was that I was a victim." J.A. 23–24.

Based on these statements, Billie and Titlow were arrested and charged with murdering Don Rogers. Titlow cooperated by giving a statement to the police and taking a polygraph examination. In a statement, Titlow said that he and Billie, without a prior plan, poured vodka down Don's throat, and Billie then suffocated Don with a pillow. J.A. 38. Titlow "denied killing Donald Rogers personally" and denied "that he planned the death." J.A. 38. An examiner then administered the polygraph and determined Titlow was being truthful in answering the following questions:

Q1: Are you lying about what happened that night with Don?

A: No.

Q2: Did you plan with Billie to kill Don when he was drunk?

A: No.

Q3: Are you lying that Billie is the one that smothered him with that pillow?

A: No.

Q4: Did you personally smother Don with that pillow?

A: No.

Q5: Are you lying that you left when Billie smothered him?

A: No. [J.A. 39.]

On October 29, 2001, Titlow appeared in court with his first retained attorney, Richard Lustig, to accept a plea offer. In exchange for testifying at Billie's trial and pleading guilty to manslaughter, Titlow would receive an above-guidelines sentence of 7 to 15 years.[2] J.A. 42–43.

---

[2] Unlike the federal system, Michigan has an indeterminate sentencing scheme, so a criminal defendant is given a minimum sentence and a maximum sentence. *People* v. *Lowe*, 773 N.W.2d 1, 3–4 (Mich. 2009). An offender will serve at least his minimum sentence. Mich. Comp. Laws § 791.234(1).

The prosecutor expressly reserved the right to withdraw the offer if Titlow failed to testify. J.A. 43. And to establish the factual foundation for the plea, Titlow testified that he "did pour a shot of vodka in [Don']s mouth and I did accept money afterwards [from Billie] not to say anything about what had happened." J.A. 50.

Critically, Titlow testified that he and Lustig had "gone over all of the evidence together over a long period of time." J.A. 43. And Titlow understood fully that by pouring alcohol down Don's throat and then later accepting $100,000 from Billie to keep quiet, a jury could convict him of murder:

> MR. LUSTIG: And you and I discussed the fact that there are certain facts that could get you convicted of first degree murder. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> MR. LUSTIG: All right. They include two things. Number one, that you had a—you received $100,000.00 after the death of your uncle, correct?
>
> THE DEFENDANT: Correct.
>
> MR. LUSTIG: And also, that during the course of the so-called homicide, you did feed alcohol into his system . . . .
>
> THE DEFENDANT: Yes.

> MR. LUSTIG: Okay. Now, although you didn't participate in what appears to be a smothering, you understand a jury could find you guilty of first degree murder, second degree murder, manslaughter or nothing at all. You understand that?
>
> THE DEFENDANT: Yes. [J.A. 44.]

The trial court accepted Titlow's plea. J.A. 53.

C. Titlow maintains his innocence, hires new counsel, and withdraws his plea.

While waiting in jail to testify at Billie's trial, Titlow told a deputy that he did not commit the offense. Pet. App. 101a; Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 7 ("It is true that a statement of innocence set in motion the second attorney's advice."). The deputy told Titlow that he should not plead guilty if he was not guilty, and the deputy recommended his own attorney. J.A. 298. That attorney ended up referring Titlow to another law firm, and attorney Fred Toca substituted for Lustig. J.A. 58–61, 300. Because Titlow had insufficient funds, Titlow agreed that Toca and the law firm could sell Titlow's "story" to help derive the $100,000 trial fee. J.A. 60. Contrary to Titlow's allegations below, the retainer agreement did *not* assign Toca or his law firm any rights to the story. J.A. 60.

Titlow and Toca executed the retainer agreement on November 26, 2001, J.A. 61, a mere three days before the November 29 trial where Titlow had agreed to testify against Billie. At that time, Toca knew (1) that Titlow was maintaining his innocence,

(2) Titlow had passed a polygraph examination, (3) the plea deal minimum sentence (7 years) was substantially above the guidelines minimum for a manslaughter conviction (approximately 2 to 5 years),[3] (4) the prosecutor had publicly stated that his office's analysis of the evidence revealed Titlow was only "guilty of manslaughter," and his office's theory "has always been Billie did the smothering,"[4] and (5) Titlow's previous retained attorney had gone over all the evidence and trial risks with Titlow less than one month earlier.

Given these circumstances and the press of time, Toca apparently did not pick up the file from Lustig but instead immediately re-initiated negotiations with the prosecutor, seeking a 3- to 15-year sentence. J.A. 301, 63–64. The prosecutor rejected that proposal. J.A. 64. Accordingly, Titlow withdrew his plea, testifying that he "fully" understood that the first-degree murder charge would be reinstated, and that the maximum penalty for a first-degree conviction was life in prison. J.A. 69–70.

If Toca had been given time to review Lustig's file, he would have seen the same record that Lustig had reviewed with Titlow less than one month earlier, before Titlow accepted the plea offer. And as even his co-defendant Billie's attorney acknowledged, that record was largely exculpatory:

---

[3] See Mich. Comp. Laws § 777.64 (multiple grids provide for a minimum-sentence range of 29 to 57 months).

[4] *Suspect pleads guilty to manslaughter*, DETROIT NEWS (Oct. 31, 2001), available at http://yhoo.it/114PzZb. Accord J.A. 66.

> [T]he statement[s] of Ms. Titlow are largely exculpatory and largely in fact wholly exculpatory with respect to her participation in the murder, wholly exculpatory with her participation in any suffocation, wholly exculpatory with respect to anything that was done . . . . Titlow basically admits to one thing . . . the fact that she poured some alcohol down his throat or held his nose at one point. And then she says, but I couldn't hold his mouth shut to keep him from breathing, I had to let him go. [J.A. 34–35.]

Ultimately, Titlow was unable to raise sufficient funds to pay Toca or his law firm, and Titlow's story did not sell. As a result, Toca withdrew, and the trial court appointed counsel. Attorney William Cataldo represented Titlow at trial.

D. The trial

The cumulative testimony at Titlow's trial was of an entirely different nature than that available to Toca at the time Titlow withdrew his plea.

The officers who arrived at the crime scene testified that Billie and Titlow's behavior was "out of place" and "at the extremes of a scale of normal people." J.A. 118, 103. In response to standard questions asking what happened, Titlow swore and then yelled at the officers. J.A. 101–104. Titlow did not want to provide a written statement and kept asking why it was necessary. J.A. 105. The officers testified that Titlow did *not* have glassy eyes, slurred speech, a stench of alcohol, or any coordination problems; there was no indication Titlow had been drinking at

all. J.A. 112–14, 115–17. This testimony contradicted Titlow's claim on the Chahine wiretap that Titlow was drunk the night of the murder. J.A. 21.

According to Chahine, Titlow's initial account was that he and Billie simply found Don dead in the kitchen. J.A. 137. But Titlow later changed his story, explaining to Chahine that Titlow and Billie found Don on the floor, drunk and passed out. J.A. 146. At that point, "Billie suggested that they *do what they planned on doing before*," i.e., "get rid of him [Don] now." J.A. 146 (emphasis added). And that's when Billie grabbed the vodka bottles. J.A. 146. This testimony contradicted Titlow's polygraph claim that there was no plan to kill Don. J.A. 38. Titlow and Billie then engaged in classic Burking—alternately pouring vodka down Don's throat and pinching his nose shut. J.A. 146–47.

Billie grew frustrated when Don did not die right away. J.A. 147. So Billie upped Titlow's compensation from the original $25,000 to $50,000 and retrieved a pillow from the living room. J.A. 147. Titlow did *not* tell Chahine that Titlow left the room, J.A. 149, as Titlow later tried to testify, J.A. 277. To the contrary, Chahine's questioning revealed that the increased compensation was in exchange for Titlow's help in holding Don down while Billie suffocated him:

> Q: You didn't hear a statement that she held him down so that the pillow could be placed over his head?
>
> A [by Chahine]: I did hear a statement like that.

Q: You did hear that statement?

A: Yes.

Q: What statement did you hear?

A: Billie asked her to help pin him down, so that she could put the pillow on his head.

* * *

A: . . . That was the answer for the 25 going up to 50, that she would have to do that.

Q: So Billie now is—you indicated now that [Titlow] told you that when Billie gets the pillow, that she tells [Titlow] I'll up from 25,000 to 50, but you're going to have to hold him down?

A: . . . She's saying—she said that Billie told her that she's going to up the money from 25,000 to 50,000 and she's going to help her. She's going to do something. So she asked her to pin him down so she could put the pillow—put the pillow on his face.

Q: So what you're saying is while Billie's got the pillow, she's negotiating with [Titlow]? If you want the money I'll make it higher and if you want the 50, you're going to have to do more?

A: Well, it's probably hard to believe, but they were negotiating while they were killing the man. [J.A. 177–78, 180]

Titlow's intimate participation explains why he was able to show Chahine exactly how Billie suffocated Don with the pillow. J.A. 166–67.[5]

The trial testimony continued to weaken Titlow's case from there. A medical expert testified that Don's body position suggested that the entire crime scene had been "staged," J.A. 194, presumably to avoid police detection. As a result, the death certificate was changed to reflect that the cause of death was "asphyxia by smothering." J.A. 196. Chahine testified that Titlow asked Chahine to lie and tell the police that he was with Titlow and Billie at the time of death. J.A. 161–62. Chahine also testified that Titlow had said, on "many occasions," that Billie wanted to "get rid of Don," J.A. 140, and Billie would pay Titlow $25,000 to do it, J.A. 139.

Titlow's testimony was a disaster for his defense. Contrary to the testimony and his own admissions of substantial involvement, Titlow maintained his complete lack of culpability, testifying that he "would never hurt anybody, ever." J.A. 257. Contrary to the officers' testimony about his sobriety, Titlow claimed to be "very drunk" and unaware of his surroundings.

---

[5] An obvious question is why Titlow would reveal all of this information to Chahine, whom Titlow had been dating and to whom Titlow had just disclosed he was transgender. J.A. 150. Indeed, Chahine asked that very question. J.A. 153. Titlow told him: "No one would believe you. You're a foreigner. There are two women, no records. [You] have [a] record" (for cocaine possession and making a false statement on a citizenship application). J.A. 154. Equally important, Titlow needed to get his feelings of guilt off his chest. J.A. 154. Titlow "said that [he] was doing [his] hair and [his nails] and [he] felt really, really bad spending Don's money." J.A. 154.

J.A. 258. Contrary to the testimony about Billie's frequent offers to pay Titlow to get rid of Don, Titlow insisted that he didn't think Billie was trying to kill Don, only to hurt him. J.A. 259. Contrary to the testimony about Titlow's active role in the murder, Titlow claimed that he told Billie to leave Don alone. J.A. 261. Contrary to the testimony that Titlow accepted Billie's money, he testified that he told Billie he didn't want her money. J.A. 268.

Titlow tried to convince the jury that he believed Billie was joking with the pillow. J.A. 270. And Titlow even denied receiving the $100,000, J.A. 271, though he admitted receiving $70,000 and a new car, J.A. 271–72. (Sometime after the murder, one of Billie's daughters called her. J.A. 156. The daughter knew what Billie and Titlow did, and she told Billie to give Titlow more money. J.A. 156. As a result, Titlow's compensation was ultimately upped from $50,000 to $100,000. J.A. 153, 156. Titlow told Chahine that he planned to use the money for a sex-change operation. J.A. 170–71. Financial professionals testified at trial to the series of transactions that resulted in Billie transferring the money to Titlow. J.A. 209–19, 220–23.)

The final straw came on Titlow's cross-examination. The prosecutor confronted Titlow with his testimony that he had left the room before Billie grabbed the pillow. J.A. 277. Titlow conceded that although this would have been "the perfect thing to tell the police" to explain his innocence, he never did so. J.A. 277. In fact, Titlow did not even mention that crucial "fact" when talking with Chahine during their wiretap conversation. J.A. 277.

In his closing argument, the prosecutor urged the jury to convict Titlow of first- or second-degree murder by repeatedly hammering Chahine's testimony that Titlow held Don down during the suffocation in exchange for more money. J.A. 281, 282, 283, 284, 285, 287, 288. Titlow's attorney tried repeatedly to cross-examine that crucial piece of Chahine's testimony, J.A. 177–80, but the damage had already been done. Based on the overwhelming evidence, the jury convicted Titlow of second-degree murder.

At sentencing, the prosecutor suggested that Titlow was a victim of some "bad advice," and that he was convicted by his own words. J.A. 291–92. Of course, Titlow's words on the wiretap recording were supplemented greatly by post-plea-withdrawal evidence and testimony as well as Titlow's own poor performance on the stand. Remember, the same prosecutor had characterized Titlow's initial admissions as evidence only of manslaughter, not murder. See *supra*, p. 11 & n.4. Titlow's trial attorney also thought it a "mistake" that Titlow withdrew the plea. J.A. 292. But the trial attorney continued to think—contrary to the testimony the jury believed—that Titlow "did nothing to participate whatsoever" in the suffocation. J.A. 292–93. The trial court's sentence was 20 to 40 years.

As for Billie, the State went to trial without Titlow's testimony in November 2002 and was unable to obtain a conviction. Billie died several months after her acquittal.

E. State court proceedings

Having lost his gamble to go to trial, Titlow accused Toca of being ineffective for allowing Titlow to withdraw the manslaughter plea. The Michigan Court of Appeals rejected Titlow's ineffective-assistance claim. It found that Toca's advice was "set in motion" by Titlow's assertions of innocence to Deputy Ott, and that "[w]hen a defendant proclaims his innocence, . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty—no matter how 'good' the deal may appear." Pet. App. 101a–102a. "On the proofs and arguments offered by defendant, defendant has failed to demonstrate that his second attorney's advice to withdraw his plea fell below an objective standard of reasonableness." Pet. App. 102a. The Michigan Supreme Court denied leave to appeal unanimously. Pet. App. 120a.

F. Federal habeas corpus proceedings

The district court denied Titlow habeas relief, because Titlow could not satisfy AEDPA's exacting standard for setting aside a state-court conviction: Titlow "has not shown that the Michigan Court of Appeals's decision regarding this claim is contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court or an unreasonable determination of the facts." Pet. App. 62a. Specifically, Titlow could not prevail on the deficient-performance component of his ineffective-assistance claim. See *Strickland* v. *Washington*, 466 U.S. 668 (1984). First, Titlow's "desire to withdraw her plea (which itself was motivated by a belief in innocence) pre-dated interim

counsel's involvement." Pet. App. 64a. Second, "how can a criminal defendant's counsel be ineffective for advising her to go to trial when she (the criminal defendant) claims to be innocent of the crime?" Pet. App. 64a–65a.

The Sixth Circuit reversed. The panel majority first held that the Michigan Court of Appeals had unreasonably determined the facts when it concluded that Toca's advice was based on Titlow's proclamations of innocence, because, at the plea-withdrawal hearing, Toca mentioned only the above-guidelines sentence. Pet. App. 18a–19a. Then, based on the fact that Toca relied on Titlow's protestations of innocence and did not pick up discovery materials from or discuss the case with Titlow's previous attorney until after Titlow's plea withdrawal, the majority *assumed* that Toca had not adequately advised Titlow on his sentencing exposure or the reasonableness of the plea offer. Pet. App. 19a–20a. The majority then held that Titlow established prejudice based on (1) the fact that Titlow accepted the plea before he withdrew it, (2) the sentencing disparity, and (3) Titlow's subjective testimony that he would not have withdrawn his plea but for counsel's ineffective advice. Pet. App. 22a.

The panel majority directed the State to reoffer Titlow the original plea agreement, Pet. App. 25a, even though the State had already lost the major benefit of the bargain: Titlow's testimony against Billie. The majority also ordered the Michigan trial court to fashion a sentence on remand that "remedied" the violation of Titlow's right to effective assistance. Pet. App. 25a.

Sixth Circuit Chief Judge Batchelder rejected each of these holdings. First, the panel majority failed to give appropriate AEDPA deference to the Michigan Court of Appeals' factual findings. The "record does not establish that Toca's advice was the decisive factor in Titlow's decision to withdraw her plea." Pet. App. 26a (Batchelder, C.J., dissenting). Rather, the "record shows that Titlow wanted to withdraw her plea before she ever enlisted Toca as counsel." *Id.* "Titlow has not presented any evidence indicating that Toca advised her to withdraw her plea or that he was otherwise a decisive factor in her decision to go to trial. Instead, the record indicates that she had wanted to change her plea and enlisted Toca as new counsel to do just that." Pet. App. 27a. (Batchelder, C.J., dissenting).

Second, the Michigan Court of Appeals decision did not conflict with this Court's precedent. "It is undoubtedly reasonable for an attorney to recommend that his client reject a plea if the client maintains her innocence. . . ." Pet. App. 28a. (Batchelder, C.J., dissenting.) *Id.* Moreover, the "burden is on the defendant to present evidence establishing that counsel was ineffective, and the defendant's chance of success does not rest on the government's or counsel's ability to refute the claim of ineffective, as the majority suggests." Pet. App. 29a. (Batchelder, C.J., dissenting).

"Although Toca did not pick up the file before moving for the plea withdrawal, Titlow has not explained how the file would have undermined the reasonableness of the plea withdrawal and, therefore, has not overcome the strong presumption

of reasonableness" under this Court's decision in *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984). *Ibid.* And the panel "majority cites *Lafler* v. *Cooper*, 132 S. Ct. 1376 2012), as a case involving a 'similar constitutional violation' without recognizing the crucial distinction between that case and this one—that the petitioner in *Lafler* presented actual evidence that he received deficient advice." Pet. App. 30a–31a (Batchelder, C.J., dissenting).

Finally, "*Lafler* . . . does not require the trial court to resentence Titlow." And "it is not the trial court's responsibility . . . to 'fashion a sentence for Titlow that . . . remedies the violation of her constitutional right,' as the remedy for the violation is the government's reoffering of the original plea agreement." Pet. App. 31a–32a (Batchelder, C.J., dissenting) (citing *Lafler*, 132 S. Ct. at 1389).

G. The re-offered plea

On remand, the prosecutor re-offered the manslaughter plea:

> Pursuant to the Sixth Circuit order, the People are reoffering the plea of reducing the charge of first degree premeditated murder to manslaughter with a sentence recommendation of seven to 15 years in exchange for the defendant's testimony at trial against her aunt and truthful testimony given at trial. [J.A. 319.]

But when it came time for Titlow to accept the plea, he resisted pleading guilty. He initially refused to admit the factual predicate; all he would admit

was that he "applied a shot of vodka down [Don's] mouth which ultimately led to my *aunt* taking his life." J.A. 320 (emphasis added). The prosecutor was not satisfied with this statement: "I don't think that that is an adequate basis [for the manslaughter plea] and I don't think that's what the facts are in this case. I don't think that's what the facts were at the trial which I proved beyond a reasonable doubt ten years ago." J.A. 320–21.

The trial judge asked Titlow to explain what happened the night of Don's murder. Titlow persisted with his discredited trial testimony: that he was drunk the night of the murder; that he took the bottle away from Billie and told her to stop; and that he left the room and returned to find Billie holding a pillow over Don's face. J.A. 321. And when the trial judge specifically asked Titlow if he assisted in killing Don, J.A. 321, Titlow maintained his innocence: "No and I passed a polygraph test to this." J.A. 322.

Befuddled by this turn of events, the prosecutor sought permission to *voir dire* Titlow. J.A. 322. And on cross exam, Titlow continued to maintain his innocence: he denied knowing that Billie was trying to kill Don; denied agreeing to help Billie in return for money and the car; and again brought up the polygraph. J.A. 322–23. The prosecutor threw up his hands. J.A. 323 ("Judge, I'm not going to argue with her. If she wants to plead let her plead guilty."). The trial judge then took a turn questioning Titlow, but with the same result. Titlow simply would not admit to the manslaughter factual predicate. J.A. 323–25.

The proceeding was halted so Titlow's lawyer could consult with him off the record. J.A. 325. When Titlow resumed his testimony, he finally admitted he knew it was a "possibility" that by pouring alcohol into Don's mouth, it could lead to Don's death. J.A. 325. The trial judge took the matter under advisement. J.A. 327.

SUMMARY OF ARGUMENT

In 1996, Congress enacted AEDPA, the Anti-terrorism and Effective Death Penalty Act. AEDPA "sharply limits the circumstances in which a federal court may issue a writ of habeas corpus to a state prisoner whose claim was adjudicated on the merits in the State court proceedings." *Johnson* v. *Williams*, 133 S. Ct. 1088, 1094 (2013) (internal quotations omitted). A state prisoner must establish that the state-court decision was either (1) contrary to or an unreasonable application of this Court's clearly established precedent, or (2) was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1), (2). And with respect to facts, a state court's factual determination is "presumed to be correct," and it is the habeas petitioner's burden to rebut that presumption of correctness "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Given these thresholds, this Court has described the AEDPA standard as "difficult to meet": the state prisoner must show not just a mistake, but "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Metrish* v. *Lancaster*, 133 S. Ct. 1781, 1787 (2013) (quoting *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011)).

In granting Titlow habeas relief here, the Sixth Circuit erred thrice over.

First, the Sixth Circuit failed to give proper AEDPA deference to the Michigan Court of Appeals. To begin, the Sixth Circuit disregarded the Michigan Court of Appeals' factual finding that Titlow's plea withdrawal "was set in motion by [his] statement to a sheriff's deputy that he did not commit the offense." Pet. App. 101a. The Sixth Circuit held that this finding's "presumption of correctness" was rebutted by the plea-withdrawal transcript, in which Titlow's second retained attorney, Toca, mentioned the unusually high sentencing range and not Titlow's innocence. Pet. App. 18a–19a. But Toca's statements did not rebut the factual finding, which was based on an affidavit Titlow himself submitted to the Michigan Court of Appeals. J.A. 297–98. Indeed, in his district-court briefing in this very proceeding, Titlow conceded that it "is true that [his own] statement of innocence set in motion [Toca']s advice." Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 7. Yet on the basis of the Michigan Court of Appeals' purported factual error, the Sixth Circuit engaged in what amounted to *de novo* review of the Michigan Court of Appeals' legal conclusion, relying predominantly on its own case law rather than this Court's precedents. Pet. App. 19a–21a.

The Sixth Circuit also failed to apply the exacting AEDPA standard to the Michigan Court of Appeals' legal conclusion. The Michigan Court of Appeals held that it was not objectively unreasonable for an attorney to allow his client to maintain innocence. Pet. App. 102a. The Sixth Circuit did not

say this decision was "contrary to" or an "unreasonable application of" this Court's precedent. Instead, the Sixth Circuit said that Toca's failure to pick up Lustig's file before assisting Titlow to withdraw his plea was "totally inconsistent with a reasonable investigation" under *Strickland* v. *Washington*, 466 U.S. 668, 691 (1984). Pet. App. 20a (noting *Dickerson* v. *Bagley*, 453 F.3d 690, 696 (6th Cir. 2006)). And even that conclusion was wrong given the limited time (and the substantial information) Toca had before Titlow needed to withdraw his plea.

Second, the Sixth Circuit erred in concluding that Titlow would have accepted (i.e., not withdrawn) his manslaughter plea but for Toca's purported ineffective assistance. There is no record evidence of such intent, only Titlow's post-trial statements that he would have accepted the plea. Every state prisoner would make the same claim following a jury conviction imposing a higher sentence than a rejected plea offer, and Titlow's *post hoc* assertion of intent is belied by the fact that Titlow withdrew his plea understanding full well the evidence arrayed against him at that time, as well as the potential consequences of an adverse trial result. As five other circuits have held, a state prisoner asserting plea bargainer's remorse must support his would-have-taken-the-plea assertion with additional, objective record evidence. Titlow has failed to produce such evidence here, providing a second, independent ground for reversal.

Third, in imposing a remedy, the Sixth Circuit suggested that the state trial court's sentencing discretion was cabined by the initial plea agreement, and that merely reinstating Titlow's current sentence could render Titlow's *Lafler* remedy "illusory." Pet. App. 24a–25a; *Lafler* v. *Cooper*, 132 S. Ct. 1376, 1384 (2012). But *Lafler* says no such thing. And the circumstances have changed: the State lost the benefit of the plea bargain—Titlow's testimony at Billie's trial—and the post-plea-withdrawal record looks significantly different than the record that existed when the prosecutor first extended a plea offer. In this situation, it would be entirely appropriate for the Michigan trial court to leave Titlow's conviction and sentence in place. The Sixth Circuit's contrary conclusion conflicts with *Lafler*.

ARGUMENT

I. The Sixth Circuit failed to give appropriate AEDPA deference to the Michigan Court of Appeals' decision.

Under AEDPA, federal habeas relief may not be granted unless a state-court merits decision "was contrary to, or involved an unreasonable application of" this Court's clearly established precedent, or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). This case involves the Michigan Court of Appeals' rejection of Titlow's ineffective-assistance claim.

The seminal case governing such claims, *Strickland* v. *Washington*, 466 U.S. 668 (1984), holds that a defendant must show both deficient performance by counsel and prejudice. *Id.* at 687. As to the first prong, judicial scrutiny of counsel's performance is "highly deferential" and "[a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 669. *Strickland*'s bar is "high," and surmounting it "is never an easy task." *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1485 (2010). In a habeas case, "[e]stablishing that a state court's application of *Strickland* was unreasonable under 28 U.S.C. § 2254(d) is all the more difficult." *Richter*, 131 S. Ct. at 788 (internal quotations and citations omitted). Thus, where a state court applies *Strickland*, a federal habeas court's review of a state court's ineffective-assistance decision is "doubly deferential." *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1403 (2011).

Rather than apply that double deference to the state-court ruling here, the Sixth Circuit essentially reviewed Toca's performance *de novo* after deciding that the Michigan Court of Appeals unreasonably determined the facts. But (1) Titlow failed to rebut the presumption of correctness applicable to the underlying facts, (2) the Michigan Court of Appeals' decision was not contrary to or an unreasonable application of this Court's precedent, (3) Titlow cannot show that he lacked any pertinent information when he withdrew his plea; and (4) Titlow cannot show that a more effective attorney would have made a whit of difference when Titlow decided to withdraw his plea.

A. The Michigan Court of Appeals did not unreasonably determine the facts.

In his state-court appeal, Titlow argued that Toca was ineffective for recommending that Titlow withdraw his manslaughter plea. The Court of Appeals rejected that claim because the plea withdrawal was not a Toca recommendation at all; the withdrawal "was set in motion by" Titlow's claims of innocence rather than Toca's advice. Pet. App. 101a. The Michigan Court of Appeals held that it is not objectively unreasonable to recommend that a client who proclaims innocence refrain from pleading guilty. Pet. App. 102a.

The Sixth Circuit began by attacking this factual finding. It concluded that the Michigan Court of Appeals "unreasonably determined the facts" under § 2254(d)(2) simply because Toca did not mention Titlow's innocence at the plea-withdrawal hearing; Toca only referenced the above-guidelines sentencing range. Pet. App. 18a–19a.

There are two fundamental problems with this analysis. First, Titlow has already conceded—in this very proceeding—that it "is true that a statement of innocence set in motion the second attorney's advice." Titlow's Reply to Answer to Pet. for Writ of Habeas Corpus 7. With respect to the Michigan Court of Appeals' factual determination that the "second attorney's advice was set in motion by defendant's statement to a sheriff's deputy that he did not commit the offense," Pet. App. 102a, Titlow says he "does not quibble with this finding." Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 7.

Second, the Michigan Court of Appeals *also* found that Titlow withdrew his plea because the agreed upon sentence exceeded the sentencing guidelines range." Pet. App. 100a. So it is difficult to find any fault with the Michigan Court of Appeals opinion, much less that the Michigan Court of Appeals "unreasonably determined the facts" under § 2254(d)(2).

Chief Judge Batchelder's dissent is a paradigm of AEDPA fact deference. "Any advice that Titlow may have received from Toca was the result of Titlow wanting new counsel and no longer wanting to plead guilty." Pet. App. 28a (Batchelder, C.J., dissenting). Further, neither Toca's statements at the plea-withdrawal hearing, nor the fact that Toca asserted a separate reason for withdrawing the plea, contradicted or undermined the Michigan Court of Appeals' factual conclusion that Toca's advice stemmed from Titlow's assertion of innocence. *Ibid.* Critically, although Titlow bears the burden of proof under both *Strickland* and AEDPA, he "has not presented any evidence indicating that Toca advised [Titlow] to withdraw [his] plea or that [Toca] was otherwise a decisive factor in [Titlow's] decision to go to trial. Instead, the record indicates that [Titlow] had wanted to change [his] plea and enlisted Toca as new counsel to do just that." Pet. App. 27a. Titlow has conceded this fact for purposes of his habeas petition. Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 7 ("It is true that a statement of innocence set in motion the second attorney's advice.").

As for the Sixth Circuit panel majority, it did not even apply the correct AEDPA test. The question is *not* whether the Michigan Court of Appeals' factual findings are "sufficiently rebut[ted]" by the plea-withdrawal-hearing transcript. Pet. App. 18a. AEDPA requires Titlow to rebut a "presumption of correctness" by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). But by changing the AEDPA fact-deference standard, the Sixth Circuit panel majority was able to characterize the Michigan Court of Appeals' factual findings as unreasonable, allowing the panel to then review the Michigan Court of Appeals' legal conclusion—that there was no ineffective assistance—*de novo* rather than deferentially. That approach was error.

B. The Michigan Court of Appeals' legal conclusion was not contrary to or an unreasonable application of this Court's clearly established precedent.

Once it is clear that AEDPA deference applies to the Michigan Court of Appeals' legal analysis, it is not possible to say that the Michigan Court of Appeals' decision was contrary to or an unreasonable application of this Court's clearly established law. Advising Titlow to withdraw his plea (or allowing him to do so) did not constitute deficient performance where Titlow was—as reflected in the pre-trial, trial, and post-trial record—maintaining his innocence.

The final decision to plead guilty is always the defendant's, not the attorney's. Michigan Rule of Professional Conduct 1.2(a) states that "[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, with

respect to a plea to be entered . . . ." Accord, e.g., *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004) (defendant retains "the ultimate authority" to determine whether to plead guilty); ABA Model Rules of Prof'l Conduct R. 1.2(a). The Michigan Court of Appeals below expressly acknowledged this rule: "When a defendant proclaims his innocence . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty—no matter how 'good' the deal may be." Pet. App. 102a.

Further, Michigan law does not allow a criminal defendant to maintain his innocence while simultaneously pleading guilty. While this Court has held that there is no constitutional violation where a criminal defendant maintains his innocence but nevertheless wishes to plead guilty, *North Carolina* v. *Alford*, 400 U.S. 25, 37–38 (1970) (a so-called "*Alford* plea"), this rule does not bind a state that elects to preclude a guilty plea by an accused who professes to be innocent. *Id.* at 38 n.11 ("the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence").

Michigan has made that election.[6] See Mich. Comp. Laws Ann. § 768.35 (providing that the state trial court is duty bound to set aside a guilty plea

---

[6] Michigan is not alone in its approach. See Jenny Elayne Ronis *The Pragmatic Plea: Expanding Use of the Alford Plea to Promote Traditionally Conflicting Interests of the Criminal Justice System*, 82 TEMP. L. REV. 1389, 1399 (Spring-Summer 2010) ("Courts that have completely rejected the *Alford* plea include Indiana, Michigan, and New Jersey, and federal courts strongly discourage the pursuit of an *Alford* plea by defendants.") (footnotes omitted).

before sentencing if the trial judge had "reason to doubt the truth" of the plea); Mich. Ct. R. 6.302(D)(1) (directing the state trial court to question the defendant to establish that there is support for a finding of guilt). (Although the Michigan Supreme Court has indicated in *obiter dictum* that a criminal defendant may plead guilty even when he denies his guilt, those cases did not involve a criminal defendant who sought to both deny his guilt and accept a plea offer. E.g., *People* v. *Haack*, 240 N.W.2d 704, 709 (Mich. 1976); *In re Guilty Plea Cases*, 235 N.W. 132, 147 n.2 (Mich. 1975).)

The panel majority misunderstood Michigan law on this point. After failing to accord deference to the factual determination, the panel majority then alternatively insisted that even where the defendant maintains his innocence, the attorney must still provide him with the list of available of options. Pet. App. 19a ("even where counsel properly advises a client that she has the right to go to trial if she maintains her innocence, this advice must be cabined by a larger discussion [of the client's available options]"). But Michigan does not allow a defendant to maintain his innocence and still plead guilty, and the state courts are the final authority on state law. The unstated point is that the panel majority expected Toca to attempt to dissuade Titlow from maintaining his innocence. There is no such requirement in law in a state like Michigan that does not allow *Alford* pleas. Under the Michigan rule, it was not objectively unreasonable for Toca to advise or allow Titlow to withdraw his plea.

Of course, as Chief Judge Batchelder commented, the record does not establish that Toca's advice was the decisive factor in Titlow's decision to withdraw his plea anyway. The "record shows that Titlow wanted to withdraw [his] plea before [he] ever enlisted Toca as counsel." Pet. App. 26a. In other words, Titlow's dissatisfaction with his above-guidelines sentence and his proclamations of innocence preceded Toca's involvement, and these were the reason Titlow sought new counsel, as he himself has conceded in these proceedings. Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 7 ("It is true that a statement of innocence set in motion the second attorney's advice.").

In the end, then, Titlow is unable to establish that Toca's performance was deficient even under a *de novo* standard. Pet. App. 28a–29a (Batchelder, C.J., dissenting). Based on the record before the Sixth Circuit, a fairminded jurist could have reasonably concluded that Titlow's ineffective-assistance of counsel claim had no merit. And that reality is further emphasized by the information Titlow and Toca had available to them at the time Titlow withdrew his plea.

C. Titlow has presented no evidence that he lacked any pertinent information when he withdrew his plea, or that Toca gave him deficient advice.

The Sixth Circuit was quick to assume that Titlow was not properly informed, stating that "[t]he record in this case contains no evidence" that Toca explained certain matters to Titlow and that "[w]e therefore conclude that Toca failed to fulfill" his

obligation to provide sufficient advice to Titlow during the plea-negotiation stage. Pet. App. 19a. That approach is backward. Under *Strickland*, there is "a strong presumption" that counsel's conduct fell within the wide range of reasonable professional assistance. 466 U.S. at 689. It was Titlow's burden to show that he did not receive sufficient information and advice, not the State's burden to *disprove* it.

The problem is that Titlow has no evidence, let alone clear and convincing evidence, as § 2254(e)(1) requires. At the time of his initial plea, Titlow and his first attorney, Lustig, had "gone over all of the evidence together over a long period of time." J.A. 43. Titlow also had the benefit of adverse witness testimony during a three-day preliminary exam. Titlow affirmed that he understood the risks of going to trial and the consequences of a guilty verdict. J.A. 43–45.

When Titlow withdrew his plea, he expressed his understanding that withdrawal meant reinstatement of murder charges and the possibility of a life sentence. J.A. 69–70. Titlow also acknowledged that he "fully underst[oo]d the consequences" of withdrawing his plea, and that he was doing so "freely and voluntarily." J.A. 70.

For his part, Titlow presented no evidence that Toca gave him deficient advice regarding the plea withdrawal. Titlow did not file an affidavit from Toca or of his own, nor did he move for an evidentiary hearing in the trial court, as Michigan law allows. See generally *People* v. *Ginther*, 212 N.W.2d 922 (Mich. 1973) (a so-called "*Ginther* hearing" is an evidentiary hearing on a defendant's motion for new trial claiming ineffective assistance).

Instead, Titlow's claim—and the Sixth Circuit's ruling—is based on the fact that Toca did not pick up Lustig's file in the three-day window Toca had before Titlow was scheduled to testify at Billie's trial. As explained below, if time had allowed Toca to review Lustig's file, it would not have changed the result. But more important, the alleged misconduct does not rebut the *Strickland* presumption that Toca's advice to Titlow was "the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

In other words, given the three-day window to withdraw before Billie's trial began, it was not unreasonable for Toca to allow Titlow to withdraw his plea, particularly when Toca knew: (1) that Titlow was maintaining his innocence, (2) Titlow had passed a polygraph examination, (3) Titlow's minimum sentence under the plea deal (7 years) was substantially above the guidelines minimum sentence for a manslaughter charge (approximately 2 to 5 years), (4) the prosecutor had publicly stated that his office's analysis of the evidence revealed Titlow was only "guilty of manslaughter," and his office's theory "has always been Billie did the smothering," and (5) Titlow's previous attorney had gone over all of the evidence and trial risks with Titlow less than one month earlier.

The record also rebuts any claim that Toca guaranteed Titlow a particular result at trial. Titlow acknowledged that his plea withdrawal would result in a first-degree murder charge and a potential life sentence, and the retainer agreement plainly states

that "no promises or guarantees regarding the outcome" of the case had been made. J.A. 59.[7]

Significantly, the habeas petitioner in *Lafler* provided actual evidence that his counsel advised him to reject a plea based on wrong legal advice, and the state conceded counsel's deficient performance. Not so here. "Without evidence that Toca gave incorrect advice or evidence that he failed to give material advice, Titlow cannot establish that his performance was deficient." Pet. App. 31a (Batchelder, C.J., dissenting).

In other words, Titlow failed to surmount even *Strickland*'s "high bar." *Richter*, 131 S. Ct. at 788 (quoting *Padilla*, 130 S. Ct. at 1485), much less the double-deference standard that results from AEDPA's overlay on an ineffective-assistance claim.

---

[7] The only possible thing left is Titlow's contention that Toca's retainer agreement was unethical for taking a stake in the movie and book rights to Titlow's "story." But the agreement says only that Toca and his law firm would attempt to sell Titlow's story to help pay the estimated $100,000 in trial fees; it says nothing about a transfer of rights. J.A. 60; but see J.A. 312 (order revoking Toca's law license for other, unrelated reasons mentions in passing that Toca entered into a fee agreement "wherein he improperly acquired literary or media rights related to his client's criminal matter"). And the agreement's ethical propriety would be relevant only to a civil malpractice claim, not to the constitutional question whether Titlow had adequate information and advice before withdrawing his manslaughter plea.

D. Titlow has also not demonstrated that Toca's failure to review Lustig's file would have changed Titlow's decision to withdraw his plea.

As just noted, the Sixth Circuit reached its deficient-performance conclusion based on Toca's inability to pick up Lustig's file in the three-day window before Billie's trial began. Pet. App. 19a–21a. But Titlow has not explained how Toca's review of that file would have changed Titlow's mind about withdrawing his plea. *Strickland*, 466 U.S. at 694–95 (a defendant claiming ineffective assistance must show how, "but for counsel's unprofessional errors, the results of the proceeding would have been different"); *Brown* v. *Attorney Gen. of Cal.*, 292 F. App'x 674, 675 (9th Cir. Sept. 11, 2008) (rejecting a failure-to-investigate claim because the defendant "ha[d] not shown that further investigation . . . would have produced anything significant"); *Deiterman* v. *Kansas*, 291 F. App'x 153, 161 (10th Cir. Aug. 27, 2008) (rejecting a failure-to-investigate claim because the defendant "ha[]d failed to identify any evidence that his counsel would have discovered had he conducted further investigation that would have likely changed the outcome").

Here, the problem wasn't Toca's failure to review Lustig's file; Lustig had, less than one month before, gone over those exact same facts with Titlow at great length and advised Titlow about the potential consequences of going to trial versus accepting the plea offer. J.A. 43, 44. And when Titlow withdrew his plea, he acknowledged that he "fully" understood that murder charges would be reinstated. J.A. 69–70.

In other words, the problem was not Toca's conduct; it was the *post-plea-withdrawal* evidence amplifying Titlow's guilt. The most damaging trial testimony came when Danny Chahine unexpectedly said that Titlow told Chahine that Titlow pinned Don down during the smothering in exchange for more money. This testimony surprised Titlow's trial counsel, who attempted to impeach Chahine and call his testimony into question. J.A. 178–80.

But the damage was already done. The prosecutor in closing repeatedly referenced Chahine's testimony about Titlow holding Don down while Billie smothered him. J.A. 281, 282, 283, 284, 285, 287, 288. And this crucial evidence was not available to Toca between November 26 and 29, 2001.

Lustig's file also would not have revealed that Titlow would change his story at trial. For instance, at trial Titlow testified that he never made any statements about Billie seeking to have Don killed for $25,000, or about a hit man in Denver and that amount not being enough. 3/18/02 Trial Tr., pp. 91, 110. But Detective Zimmerman testified that Titlow had made such statements during a police interview, statements made with Lustig present but without a recording device because Titlow preferred it that way. *Id.* at 217, 223. Further, while Titlow at trial denied it, *id.* at 192–93, Detective Zimmerman also testified that Titlow told police that Billie, before pouring vodka into Don, asked Titlow to help her for $25,000, and that Titlow perceived this to mean help Billie kill Don in exchange for $25,000. *Id.* at 217–18. Zimmerman also rebutted Titlow's trial testimony in several other respects. *Id.* at 218–20.

Tellingly, before trial began, even the prosecutor considered Titlow guilty of manslaughter at most. J.A. 66. It was the trial itself that established Titlow's true culpability. Thus, "[a]lthough Toca did not pick up the file before moving for the plea withdrawal, Titlow has not explained how the file would have undermined the reasonableness of the plea withdrawal and, therefore, has not overcome the strong presumption of reasonableness." Pet. App. 30a (Batchelder, C.J., dissenting). The Sixth Circuit's heavy reliance on Lustig's case file misses the big-picture issues of why Titlow withdrew his plea, what Titlow knew when he withdrew his plea, and how little a *second* review of that file—less than one month after the first review—would have affected Titlow's plea calculus.

II. A state prisoner who seeks to reclaim a rejected plea must produce objective evidence that he would have accepted the plea but for ineffective assistance.

In the context of a rejected plea, *Strickland*'s prejudice component requires a defendant to show that deficient counsel deprived him of the opportunity to plead guilty. In *Lafler*, this Court articulated a three-part test for this proof, with the first part divided into two additional sub-parts. A defendant must show "a reasonable probability

> [1] that the plea offer would have been presented to the court (i.e.,
>
> > [a] that the defendant would have accepted the plea and

> [b] the prosecution would not have withdrawn it in light of intervening circumstances),
>
> [2] that the court would have accepted its terms, and
>
> [3] that the conviction or sentence, or both, under the offer's terms would have been less severe" than the punishment ultimately faced. [132 S. Ct. at 1385.]

The question here is what proof satisfies sub-component [1][a], i.e., that Titlow would have accepted the plea.

The Sixth Circuit rested its analysis on Titlow's previous acceptance of the plea offer (before he withdrew it), the sentencing disparity, and his post-conviction statements (wrongly referred to by the panel majority as "testimony," Pet. App. 22a) that he would have not withdrawn but for Toca's ineffective assistance. Pet. App. 22a. Consider how each of these evidentiary pieces fit within the *Lafler* rubric.

The plea's initial presentation and trial-court acceptance satisfy parts (1)(b) and (2) of the *Lafler* test. The sentencing disparity satisfies part (3). But Titlow's acceptance of the first plea cannot be used to satisfy (1)(a), because Titlow withdrew the plea and maintained his innocence. Titlow cannot rely on the sentencing disparity to satisfy (1)(a), either. The third part of the *Lafler* test *always* requires a defendant to show a disparity, so sentencing disparity is a given.

That leaves only Titlow's self-serving, post-conviction, unsworn statements that he would have kept his plea deal absent ineffective assistance. And, in the Sixth Circuit, nothing more is required: "Although some circuits have held that a defendant must support his own assertion that he would have accepted the offer with additional objective evidence, we in this circuit have declined to adopt such a requirement." *Smith* v. *United States*, 348 F.3d 545, 551 (6th Cir. 2003) (quoting *Griffin* v. *United States*, 330 F.3d 733, 737 (6th Cir. 2003)); Pet. App. 22a (citing *Smith* as support for the panel's ability to consider Titlow's post-conviction statements "as evidence of Titlow's [pre-conviction] intent.").

But at least five other circuits disagree. The Seventh, Second, and Eleventh Circuits have all held, in published opinions, that a defendant's post-conviction statement that he would have accepted a plea offer is *not* sufficient to show *Strickland* prejudice, and that some objective evidence of the defendant's intent is required. *Paters* v. *United States*, 159 F.3d 1043, 1047 (7th Cir. 1998); *Toro* v. *Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991); *United States* v. *Gordon*, 156 F.3d 376, 381 (2d Cir. 1998); *Diaz* v. *United States*, 930 F.2d 832, 835 (11th Cir. 1991). The Tenth and Eighth Circuits have done the same, albeit in unpublished decisions. *United States* v. *Morris*, 106 F. App'x 656, 2004 WL 1598792, at *2 (10th Cir. July 19, 2004); *Maldonato* v. *Archuleta*, 61 F. App'x 524, 2003 WL 361303, at *2 (10th Cir. Feb. 20, 2003); *Bachicha* v. *Shanks*, 66 F.3d 338, 1995 WL 539467, at *1 (10th Cir. Aug. 31, 1995); *Moses* v. *United States*, 175 F.3d 1025, 1999 WL 195675, at *1 (8th Cir. 1999).

These courts justifiably have been skeptical of a defendant's post-conviction statements about his willingness to accept a previously rejected plea; after a defendant has rolled the dice and lost at trial, he has every incentive to recapture the benefit of a rejected plea. Requiring *some* objective evidence of the defendant's intent, as at least five circuits do, makes sense.

While *Lafler* did not directly address this issue, that case involved substantial evidence supporting the defendant's intent to accept the plea, including testimony by counsel at an evidentiary hearing that the petitioner was open to pleading guilty, *Cooper* v. *Lafler*, 376 F. App'x 563, 572 (6th Cir. 2010), and pre-trial communication between the petitioner and the court in which the petitioner admitted guilt and expressed a willingness to accept the offer. *Lafler*, 132 S. Ct. at 1383. Titlow offers nothing similar in the way of objective evidence here, and the contrary evidence is overwhelming.

Titlow cannot dispute that he withdrew his initial plea despite having been thoroughly advised about the evidence arrayed against him and the potential risks of proceeding to trial. Titlow cannot dispute that it was his own statement of innocence that set in motion his second attorney's advice. Titlow cannot dispute that he continued to maintain his innocence at trial. Nor can he dispute that the prosecutor, the trial court, and even his own attorney

struggled to persuade Titlow to admit his guilt on remand from the Sixth Circuit.[8]

At a bare minimum, a state prisoner's statements about his intent to accept a plea must at least be credible. *Merzbacher* v. *Shearin*, 706 F.3d 356, 366–67 (4th Cir. 2013). Titlow's statement here is not credible. In finding prejudice, the Sixth Circuit said that Titlow's naked assertion was "bolstered" by the fact that he had actually accepted the plea once before. Pet. App. 22a. But with full knowledge of the evidence gathered against him and of the consequences of going to trial, Titlow changed his mind about the initial plea and withdrew it. So the plea withdrawal undercuts—rather than bolsters—Titlow's post-conviction assertion.

The record also rebuts Titlow's post-conviction statement that he would have kept his initial plea had he not been "persuaded" to withdraw it. J.A. 295. The record shows instead that Titlow regretted the above-guidelines minimum sentence that his plea

---

[8] Relying on its own precedent, the Sixth Circuit held that "declarations of innocence" were not clear evidence that a defendant would have rejected a plea offer with proper legal advice. Pet. App. 16a-17a. But such evidence is a strong indicator that a defendant would not have accepted a plea offer. *Merzbacher* v. *Shearin*, 706 F.3d 356, 366 (4th Cir. 2013) (state trial court's decision was not objectively unreasonable in determining that the defendant would not have accepted the plea where "he avidly and vociferously maintained his innocence throughout the proceedings.") And while this Court's precedent indicates that a defendant can enter a guilty plea while still maintaining his innocence, *Alford*, 400 U.S. at 33, that is very different from the situation here, where Titlow withdrew his plea in part because he was maintaining his innocence, and Michigan does not accept such pleas.

agreement called for, and that Titlow maintained his innocence. In fact, there is no record evidence that Toca even advised Titlow to withdraw the plea. And in the absence of such evidence, the courts must *presume* that Toca's conduct "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 669.

Further undermining Titlow's credibility that he would have accepted the manslaughter plea is the reality that Titlow continued to deny responsibility for Don's death to the bitter end. After the Sixth Circuit granted Titlow habeas relief, and before this Court granted certiorari, the State, complying with the Sixth Circuit's ruling, reoffered Titlow its pretrial plea to manslaughter on October 31, 2012.[9] The whole foundation of Titlow's habeas victory was that he would have accepted the prosecutor's plea offer if Titlow had only received accurate advice about the risks of going to trial. Yet when finally confronted with the re-offered plea, Titlow *still* resisted accepting the plea offer—even after those risks had been realized in his actual conviction—in an almost comical display of maintaining his innocence.

---

[9] Because the Sixth Circuit denied the State's request to stay the mandate and the mandate issued on August 10, 2012, the State had until November 8, 2012, to comply with the Sixth Circuit's order to reoffer Titlow the original plea agreement. The State re-offered its pretrial plea to Titlow on October 31, 2012, conditionally. On March 13, 2013, the Oakland County Circuit Court granted the State's motion to stay pending the outcome of the proceedings in this Court.

When the Michigan trial court first asked Titlow what made him guilty of manslaughter, Titlow said it was applying "a shot of vodka down – in his mouth which ultimately led to my *aunt* taking his life." J.A. 320 (emphasis added). When the court asked if he assisted in killing Don, Titlow replied "[n]o and I passed a polygraph test to this." J.A. 322. When the court repeatedly asked for a factual basis, Titlow again replied that he had "passed the polygraph test." J.A. 322. Titlow said he didn't even "assist in killing" Don. J.A. 323. "I did pour a shot of vodka down his mouth. That is it. That is all I did." J.A. 324. But, according to Titlow, he "had no idea [Billie] was going to be doing anything else" when the two of them poured vodka down Don's mouth. J.A. 324. These answers forced defense counsel to take a break to consult with Titlow off the record, J.A. 325, after which Titlow finally said that his actions placed Don in a position to die. J.A. 325.

In sum, the prosecutor, defense counsel, and the trial court itself had to undergo legal gymnastics to obtain Titlow's admission to the factual predicate for a manslaughter plea, as Michigan law requires. Titlow's continued assertions of innocence, and minimization of his responsibility, rebut his post-conviction statements that he wanted to keep his initial plea. *United States* v. *Stevens*, 149 F.3d 747, 748 (8th Cir. 1998) (defendant could not establish prejudice in light of his post-trial assertions of innocence). Because Titlow cannot credibly assert that he would have kept the manslaughter plea but for the ineffective assistance of his attorney Toca, he is barred from pursuing a *Lafler* remedy.

III. *Lafler* does not require a state trial court to resentence or otherwise "remedy" the purported constitutional violation.

A. The Sixth Circuit erroneously created an entirely new scheme for fashioning a *Lafler* remedy.

If a convicted defendant can establish true deficient performance and resulting prejudice (i.e., that the defendant would have accepted a plea but for the ineffective assistance), then the *Lafler* remedy depends on the injury. If "the sole advantage a defendant would have received under the plea is a lesser sentence," i.e., the charges that the defendant would have admitted to obtain the plea are the same as the charges that resulted in the trial conviction, then the trial court "may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between." *Lafler*, 132 S. Ct. at 1389.

Alternatively, as was the case here, if "an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial," "the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal." *Id.* "Once this has occurred, the judge can then exercise discretion in deciding whether to [1] vacate the conviction from trial and accept the plea or [2] leave the conviction undisturbed." *Id.*

Lafler left "open to the trial court" how best to exercise its discretion, but the opinion did identify two considerations: the defendant's willingness to accept responsibility for his actions, and information discovered post plea. *Id.* at 1389, 1391. This Court made clear that it was the reoffering of the plea—not the trial court's exercise of its sentencing discretion—that constituted the "remedy." *Id.* at 1389 ("the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal.").

Here, the Sixth Circuit created an entirely different scheme for fashioning a *Lafler* remedy. The Sixth Circuit indicated that the trial court should "exercise its discretion to *fashion a sentence*" for Titlow. Pet. App. 25a (emphasis added). But nothing in *Lafler* contemplates a re-fashioned sentence; to the contrary, as Chief Judge Batchelder noted in dissent, "*Lafler* . . . does not require the trial court to resentence Titlow [at all]. Instead, *Lafler* states that once the prosecution reoffers the plea proposal, 'the judge can exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." Pet. App. 31a (Batchelder, C.J., dissenting) (citing *Lafler*, 132 S. Ct. at 1389). *Lafler* merely restores a defendant's opportunity to accept a plea; it does not guarantee a different outcome.

The Sixth Circuit's mistake is not trivial, as it impinges on the state trial court's discretion to accept or reject the plea offer. See generally Mich. Ct. Rule 6.302(C)(3) ("If there is a plea agreement and its terms provide for the defendant's plea to be made

in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may . . . reject the agreement"). But the panel majority says this discretion is now limited, and that endorsing the original sentence would cause the *Lafler* remedy to be "illusory." Pet. App. 24a–25a. *Lafler* has no such warning, nor does it suggest that further federal review looms due to any departure from the terms of the original plea offer.

The Sixth Circuit also erred by directing the state trial court to consult the initial plea agreement as a "baseline" in crafting a new sentence. *Lafler* does not impose that requirement either. Pet. App. 31a (Batchelder, C.J., dissenting) ("*Lafler* does not, as the majority states, *require* the trial court to consult the plea agreement."). By directing the state trial court to fashion a sentence with the lesser charge of manslaughter as its baseline, the Sixth Circuit improperly limited the trial court's discretion to simply leave the conviction undisturbed. And, as explained below, reinstating the post-trial conviction would be an entirely appropriate outcome here.

B. The trial could, in its discretion, leave undisturbed Titlow's trial conviction and sentence.

The plea in this case is radically different from those at issue in *Lafler* and *Missouri* v. *Frye*, 132 S. Ct. 1399 (2012), because the proposed plea bargain included Titlow's promise to testify against Billie at Billie's trial. J.A. 42. When Titlow chose to withdraw his plea on the day that Billie's trial began, the prosecution lost its key witness, and the jury acquitted Billie, who passed away a short time later.

As a result, it is no longer possible for Titlow to perform the testimonial obligation that was the indispensable predicate for his reduced sentence. Titlow's refusal to testify will forever deprive the State of the benefit of its bargain.

In addition, the trial court may consider the new, post-plea information about Titlow's crime. *Lafler*, 132 S. Ct. at 1391. Drawing all reasonable inferences in favor of the jury's conviction, the trial testimony revealed that (1) Titlow was sober, not drunk, on the night of the murder; (2) in his interaction with the officers on the scene, Titlow acted as though he had something to hide; (3) the crime scene itself was almost certainly "staged" to avoid police suspicion; (4) Titlow had planned with Billie to murder Don for some time; (5) Titlow did not leave the room while Billie smothered Don; (6) to the contrary, Titlow actively participated in holding Don down while he suffocated; (7) Titlow performed these acts in exchange for six-figure compensation; and (8) Titlow asked a third party to lie to establish an alibi. Had the prosecutor known *all* these facts earlier—particularly the fact that in exchange for the money Titlow held Don down while Billie smothered him—it is doubtful the prosecutor would have offered a mere manslaughter plea.

Finally, the trial court may take into account Titlow's unwillingness to accept responsibility for his actions. *Lafler*, 132 S. Ct. at 1389. Titlow not only refused to accept responsibility before, during, and after trial, he would not even accept responsibility after the Sixth Circuit remanded and ordered the prosecutor to reoffer the manslaughter plea that

Titlow supposedly desired. J.A. 319–25. In light of all these circumstances, it would be well within the trial court's discretion to simply reinstate Titlow's current sentence.

Justice Alito forecast this exact situation in his *Lafler* dissent. In Justice Alito's view, requiring the prosecution to renew an old plea offer "would represent an abuse of discretion in at least two circumstances: first, when important new information about a defendant's culpability comes to light after the offer is rejected, and, second, when the rejection of the plea offer results in a substantial expenditure of scarce prosecutorial or judicial resources." *Lafler*, 132 S. Ct. at 1398–99 (Alito, J., dissenting). One could add to those two circumstances a third—when an old plea offer is contingent on the defendant's testimony at another trial and the defendant fails to testify. Yet the Sixth Circuit panel majority ordered the State to reoffer the old plea despite the presence of all three harbingers of discretion abused.

Most concerning, the Sixth Circuit panel majority did not stop at ordering the old plea to be reoffered; the majority went further and essentially foreclosed the trial court from exercising the option of letting the original conviction and sentence stand: "We remain concerned that the remedy articulated in *Lafler* could become illusory if the state court chooses to merely reinstate Titlow's current sentence." Pet. App. 24a–25a.

Instead, the Sixth Circuit characterized the plea offer as a "baseline" for the trial court to "consult[ ]." Pet. App. 24a. And the Sixth Circuit concluded by suggesting that if the state court imposes a sentence

greater than that set forth in the plea, then a federal court would have an opportunity to consider whether the state court abused its discretion. Pet. App. 25a. Such a notion does not appear anywhere in *Lafler* or *Frye*, and the discussion in its entirety stands *Lafler* on its head.

Even more concerning, the Sixth Circuit's confusion about the *Lafler* remedy is not limited to this case. A short time after issuing the opinion here, the Sixth Circuit vacated a conviction in a federal prosecution; instructed the district court to allow the government 90 days to either re-offer the original plea agreement or release the defendant from custody; and ordered the district court *to impose the plea sentence* "to remedy the violation of Jones' right to the effective assistance of counsel." *Jones* v. *United States*, 2012 WL 5382950, at *3 (6th Cir. Nov. 5, 2012). In other words, the Sixth Circuit took away the trial court's discretion altogether.

In sum, it is necessary for this Court to reemphasize that (1) a state trial court's remand options are precisely those that *Lafler* describes; and (2) a state trial court does not abuse its discretion by allowing the original post-trial-conviction sentence to stand in appropriate circumstances.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

John J. Bursch
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Aaron D. Lindstrom
Assistant Solicitor General

Raina Korbakis
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

Dated: JUNE 2013

RESPONDENT'S BRIEF

JUL 17 2013
OFFICE OF THE CLERK

No. 12-414

IN THE

Supreme Court of the United States

SHERRY L. BURT, WARDEN,
Petitioner,

v.

VONLEE NICOLE TITLOW,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT VONLEE NICOLE TITLOW

JEFFREY T. GREEN
KAREN S. SMITH
BRIAN A. FOX
BENJAMIN B. GLERUM
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8000

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV.
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

VALERIE R. NEWMAN*
JESSICA L. ZIMBELMAN
STATE APPELLATE
DEFENDER OFFICE
645 Griswold Street
Suite 3300
Penobscot Building
Detroit, MI 48226
vnewman@sado.org
(313) 256-9833

Counsel for Respondent

July 17, 2013

* Counsel of Record

QUESTIONS PRESENTED

1. Whether the Sixth Circuit gave appropriate deference to the Michigan Court of Appeals under AEDPA in holding that defense counsel was constitutionally ineffective.

2. Whether a convicted defendant's subjective testimony that she would have accepted a plea but for ineffective assistance, is, *standing alone*, sufficient to demonstrate a reasonable probability that defendant would have accepted the plea.

3. Whether *Lafler* v. *Cooper* always requires a state trial court to resentence a defendant who shows a reasonable probability that she would have accepted a plea offer but for ineffective assistance, and to do so in such a way as to "remedy" the violation of the defendant's constitutional right.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
INTRODUCTION	3
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	15
ARGUMENT	18
I. AEDPA DEFERENCE CANNOT PROTECT THE MICHIGAN COURT OF APPEALS' DECISION IN THIS CASE	18
A. The Michigan Court Of Appeals' Decision Was Based On An Unreasonable Determination Of The Facts	18
B. The Michigan Court Of Appeals' Decision Was Based On An Unreasonable Application Of *Strickland*	25
1. The State Court's Assumption That Counsel's Advice To Withdraw The Plea Was Appropriate Because Ms. Titlow Supposedly Claimed Her Innocence Was An Unreasonable Application Of *Strickland*	26
2. Counsel Failed To Make Any Investigation Into Ms. Titlow's Case Before Recommending The Withdrawal Of The Guilty Plea	27

TABLE OF CONTENTS—continued

Page

3. The State Court Created An Unprecedented And Ill-Advised Categorical Limit On Counsel's Duties To A Client Who Claims Innocence During Plea Bargaining 32

II. THE SIXTH CIRCUIT'S OPINION AS TO THE REQUIRED CORROBORATION FOR MS. TITLOW'S CLAIM IS ENTIRELY CONSISTENT WITH THIS COURT'S HOLDINGS IN *COOPER* AND *STRICKLAND* 35

A. The Court Should Not Reach This Issue Because This Case Does Not Raise The Question Presented 35

1. The Sixth Circuit Considered Objective Evidence That Ms. Titlow Would Have Pleaded Guilty 35

2. This Case Presents No Genuine Conflict Among The Circuits 37

B. Ms. Titlow Has Amply Demonstrated A Reasonable Probability That She Would Have Accepted The Plea 39

C. The State Improperly Urges This Court To Revisit Its Decision In *Cooper* By Requiring A More Stringent Standard For Evaluating Prejudice Claims 43

III. THE SIXTH CIRCUIT'S REMEDY FAITHFULLY APPLIED *COOPER* 46

A. Review Of This Question Is Premature .. 46

B. No Controversy Exists As To The Proper Meaning And Application Of *Cooper* 48

TABLE OF CONTENTS—continued

Page

C. The Sixth Circuit Properly Applied *Cooper* 49

D. The State's Interest In Determining The Appropriate Remedy For A Sixth Amendment Violation Is Minimal..... 51

CONCLUSION 53

TABLE OF AUTHORITIES

Page(s)

CASES

Beckham v. *Wainwright*, 639 F.2d 262 (5th Cir. 1981) 28
Benge v. *Johnson*, 474 F.3d 236 (6th Cir. 2007) 20
Boren v. *Sable*, 887 F.2d 1032 (10th Cir. 1989) 21
Boria v. *Keane*, 99 F.3d 492 (2d Cir. 1996) . 32
Bunting v. *Mellen*, 541 U.S. 1019 (2004) (Stevens, J., joined by Ginsburg and Breyer, JJ., respecting denial of certiorari) 38
California v. *Rooney*, 483 U.S. 307 (1987)... 47
Cooper v. *Lafler*, 376 F. App'x 563 (6th Cir. 2010), *vacated and remanded by Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012) 44
Diaz v. *United States*, 930 F.2d 832 (11th Cir. 1991) 38, 45
Florida v. *Nixon*, 543 U.S. 175 (2004) 34
Griffin v. *United States*, 330 F.3d 733 (6th Cir. 2003) 39
Harrington v. *Richter*, 131 S. Ct. 770 (2011) 29
Hill v. *Lockhart*, 474 U.S. 52 (1985) 26
Jimenez v. *Thaler*, No. 3:11-CV-0697-B, 2011 U.S. Dist. LEXIS 150896 (N.D. Tex. Dec. 5, 2011), *adopted by Jiminez* v. *Thaler*, No. 3:11-CV-0697, 2012 U.S. Dist. LEXIS 2177 (N.D. Tex. Jan. 9, 2012) 38
Julian v. *Bartley*, 495 F.3d 487 (7th Cir. 2007) 38, 41
Kimmelman v. *Morrison*, 477 U.S. 365 (1986) 32, 52

TABLE OF AUTHORITIES—continued

Page(s)

Lafler v. *Cooper*, 132 S. Ct. 1376 (2012)... passim
Lewandowski v. *Makel*, 949 F.2d 884 (6th Cir. 1991)..... 51
Maldonado v. *Archuleta*, 61 F. App'x 524 (10th Cir. 2003)..... 38
McCarthy v. *Bruner*, 323 U.S. 673 (1944)... 48
McClanahan v. *Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971)..... 48
Merzbacher v. *Shearin*, 706 F.3d 356 (4th Cir. 2013), *petition for cert. filed* (U.S. Apr. 25, 2013) (No. 12-9952)..... 38, 39
Miller-El v. *Cockrell*, 537 U.S. 322 (2003)... 22
Miller-El v. *Dretke*, 545 U.S. 231 (2005) 22
Missouri v. *Frye*, 132 S. Ct. 1399 (2012) 15, 30
Moreno-Espada v. *United States*, 666 F.3d 60 (1st Cir. 2012)..... 38
Murray v. *U.S. Bureau of Prisons*, No. 95-5204, 1997 WL 34677 (6th Cir. Jan 28, 1997)..... 3
North Carolina v. *Alford*, 400 U.S. 25 (1970)..... 34
Nunes v. *Mueller*, 350 F.3d 1045 (9th Cir. 2003)..... 38
Padilla v. *Kentucky*, 130 S. Ct. 1473 (2010) 33
People v. *Frazier*, 300 N.W.2d 408 (Mich. Ct. App. 1980)..... 35
People v. *Ginther*, 212 N.W.2d 922 (Mich. 1973)..... 19
People v. *Haack*, 240 N.W.2d 704 (Mich. 1976)..... 34
People v. *Marji*, 447 N.W.2d 835 (Mich. Ct. App. 1989)..... 19
People v. *Titlow*, 738 N.W.2d 715 (Mich. 2007)..... 12

TABLE OF AUTHORITIES—continued

Page(s)

People v. *Titlow*, No. 273274 (Mich. Ct. App. Apr. 27, 2007) 12
Premo v. *Moore*, 131 S. Ct. 733 (2011) 32, 34
Raysor v. *United States*, 647 F.3d 491 (2d Cir. 2011) 38, 45
Roe v. *Flores-Ortega*, 528 U.S. 470 (2000) ... 26
Rogers v. *United States*, 522 U.S. 252 (1998) (O'Connor, J., concurring in result) 48
S. Union Co. v. *United States*, 132 S. Ct. 2344 (2012) 50
Smith v. *Butler*, 366 U.S. 161 (1961) 36
Smith v. *United States*, 348 F.3d 545 (6th Cir. 2003) 31, 39, 45
Strickland v. *Washington*, 466 U.S. 668 (1984) ..... passim
Taylor v. *Maddox*, 366 F.3d 992 (9th Cir. 2004) 19, 20, 21
Teti v. *Bender*, 507 F.3d 50 (1st Cir. 2007) .. 19
Toro v. *Fairman*, 940 F.2d 1065 (7th Cir. 1991) 44
United States v. *Anderson*, 705 F. Supp. 2d 1 (D.D.C. 2010) 38
United States v. *Day*, 969 F.2d 39 (3d Cir. 1992) 38, 45
United States v. *Gordon*, 156 F.3d 376 (2d Cir. 1998) (per curiam) 45
United States v. *Soto-Lopez*, 475 F. App'x 144 (9th Cir. 2012) 28
Wanatee v. *Ault*, 259 F.3d 700 (8th Cir. 2001) 38
Wiggins v. *Smith*, 539 U.S. 510 (2003) 21, 27, 29, 31

TABLE OF AUTHORITIES—continued

Page(s)

Williams v. *Taylor*, 529 U.S. 362 (2000)..... 26
Wood v. *Allen*, 558 U.S. 290 (2010)..... 20

STATUTE

28 U.S.C. § 2254(d)(1)-(2)..... 16, 18

RULES

Mich. Ct. R. 6.302..... 34, 47
Mich. Ct. R. 7.211(C)(1) 19
Sup. Ct. R. 15.2..... 36

OTHER AUTHORITIES

Am. Bar Ass'n, *ABA Standards For Criminal Justice: Prosecution and Defense Function*, Standard 4-4.1: Duty to Investigate (3d ed. 1993), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html#4.1..... 33

Michigan Attorney Discipline Board, *Grievance Administrator* v. *Dorsey*, Nos. 02-118-AI, 02-121-JC (July 1, 2005), *available at* http://www.adbmich.org/coveo/opinions/2005-07-01-02o-118.pdf.... 7

Nat'l Legal Aid & Defender Ass'n, *Performance Guidelines for Criminal Defense Representation*, Guideline 6.2: The Contents of the Negotiations (2011), *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#sixtwo 29

TABLE OF AUTHORITIES—continued

Page(s)

The Bluebook: A Uniform System of Citation B4.2 (Colum. L. Rev. Ass'n et al. eds., 19th ed. 2010) 4

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, § 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 *et seq.*), provides in § 2254:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

INTRODUCTION

The Michigan Court of Appeals concluded that Respondent Vonlee Nicole Titlow[1] had no redress for her attorney's outrageous and uninformed advice to withdraw a favorable plea—which the trial court had already accepted—because of a nonexistent claim of innocence. Rather than analyzing Ms. Titlow's now-disbarred attorney's failure to conduct any investigation or evaluating that attorney's disastrous advice to withdraw the plea under *Strickland*'s case-by-case inquiry, the state court latched onto the nonexistent innocence claim and held that whenever "a defendant proclaims his innocence . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty—no matter how 'good' the deal may appear." Pet. App. 102a. If *Missouri* v. *Frye* and *Lafler* v. *Cooper* are to mean anything at all, the Sixth Circuit's decision conditionally granting Ms. Titlow's petition for habeas corpus must be affirmed.

The two other questions raised by the State are not properly presented in this case. First, the Sixth Cir-

---

[1] Respondent Vonlee Nicole Titlow is a transgender woman who has lived as female since childhood. Throughout her trial and appeal, she has consistently referred to herself with feminine pronouns. Out of respect for her identity and consistent with the opinions of the federal courts in this case, Respondent Titlow will be referenced by feminine pronouns throughout this brief. *See* Pet. App. 34a ("This opinion will refer to Petitioner as a female"); Pet. App. 2a ("Vonlee Nicole Titlow, a transgender prisoner . . . appeals from the district court's denial of *her* petition for a writ of habeas corpus following *her* conviction . . .") (emphasis added); *see also Murray* v. *U.S. Bureau of Prisons*, No. 95-5204, 1997 WL 34677, at *1 n.1 (6th Cir. Jan 28, 1997) ("Murray uses the feminine pronoun to refer to herself. Although the government in its brief used the masculine pronoun, for purposes of this opinion we will follow Murray's usage.").

cuit did not rely exclusively on Ms. Titlow's subjective testimony in finding that she had demonstrated a reasonable probability that but for counsel's advice, she would not have withdrawn her plea. Rather, the Sixth Circuit relied on the complete trial record, which demonstrates objective corroborating evidence that Ms. Titlow in fact accepted the plea agreement, the trial court approved it, and the constitutionally deficient advice offered by her attorney caused the plea withdrawal. Furthermore, no record evidence suggests that Ms. Titlow sought new counsel for the purpose of maintaining her innocence after entering a plea.

Second, the issue of the appropriate remedy in this case is premature. The state court has not yet fashioned any remedy for the violations of Ms. Titlow's Sixth Amendment rights, and the Sixth Circuit did not dictate how the state court may exercise its discretion in doing so. Moreover, even if the question was properly before the Court, the Sixth Circuit correctly applied *Cooper*[2] when it ordered the state to reoffer the plea agreement to Ms. Titlow, while recognizing that the state court could use its discretion

---

[2] This brief uses *Cooper* as the short-form citation to *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012). Though Anthony Cooper was the respondent in that case, Blaine Lafler, the petitioner and warden of a Michigan correctional facility, is a frequent litigant. *See The Bluebook: A Uniform System of Citation* B4.2, at 13 (Colum. L. Rev. Ass'n et al. eds., 19th ed. 2010) ("When using only one party name in a short form citation, use the name of the first party, unless that party is a geographical or *governmental or other common litigant*.") (emphasis added). Mr. Lafler has been a party to more than fifty petitions for certiorari before this Court and to many habeas actions filed in the Eastern District of Michigan. Using Mr. Lafler's name would only create needless confusion. *See, e.g.*, S.G. Br. at 20 n.6 (confusing the identities of Mr. Lafler and Mr. Cooper by referring to Mr. Lafler as the criminal defendant).

"to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." Pet. App. 24a.

STATEMENT OF THE CASE

When the police arrived at the home of Donald and Billie Rogers in the early morning hours of August 12, 2000, they found Donald Rogers, Ms. Titlow's wealthy uncle, lying dead on the kitchen floor. J.A. 127. Hours earlier, the chronic alcoholic had passed out and fallen from his chair. J.A. 20. The authorities initially concluded that Mr. Rogers's death resulted from a combination of natural causes and acute alcohol intoxication, but his death certificate was later amended to indicate that he died from asphyxia by smothering. J.A. 184-86.

In the days that followed, Ms. Titlow revealed the truth about her uncle's death to her boyfriend, Danny Chahine. Ms. Titlow told Mr. Chahine that she and Ms. Rogers had poured vodka down Mr. Rogers's throat after he had passed out and held their hands over Mr. Rogers's mouth and nose, and that Ms. Rogers had smothered Mr. Rogers with a pillow. J.A. 321-22. Mr. Chahine approached the police, and at the police's request, wore a recording device on a subsequent date with Ms. Titlow. J.A. 18-32. During the date, Ms. Titlow repeated similar details about her role in Mr. Rogers's death, and asked Mr. Chahine to serve as an alibi. JA. 278. The recording captured Ms. Titlow saying that she felt "guilty for killing [Mr. Rogers]." J.A. 23.

Ms. Rogers was the sole beneficiary of Mr. Rogers's large estate. Soon after Mr. Rogers's death, Ms. Rogers gave Ms. Titlow approximately $100,000 in the form of a new car and a check so that Ms. Titlow would keep quiet about the incident. J.A. 270-71.

In January 2001, Ms. Rogers and Ms. Titlow were arrested and charged with first-degree premeditated murder, which in Michigan carries a mandatory life sentence without the possibility of parole.

Plea Proceedings

Richard Lustig, Ms. Titlow's first attorney, filed numerous pre-trial motions and succeeded in having Ms. Titlow's trial severed from Ms. Rogers's. Mr. Lustig also negotiated a plea bargain. As a condition precedent to the plea, a polygraph examination was administered to Ms. Titlow on October 25, 2001, and confirmed that she aided and abetted Ms. Rogers in Mr. Rogers's death. During the polygraph interview, Ms. Titlow admitted to helping pour vodka down Mr. Rogers's throat and stated that Ms. Rogers had subsequently smothered Mr. Rogers with a pillow. J.A. 38. The polygraph examiner concluded that Ms. Titlow was being truthful. J.A. 39.

Ms. Titlow agreed to a conditional plea, which reduced the charge from first-degree premeditated murder to manslaughter.[3] On October 29, 2001, Ms. Titlow entered a plea of guilty pursuant to the plea agreement. The additional conditions of the plea were that she accept a sentence of seven to fifteen years imprisonment, testify against her aunt at trial in accordance with the polygraph examination, and waive her right to appeal the plea or sentence. J.A. 42-43.

---

[3] The Michigan Sentencing Guidelines provide a range in which a judge can set a presumptively appropriate minimum sentence. State law determines the maximum allowable sentence. For manslaughter, the maximum is fifteen years. The sentence for first-degree murder is life in prison without the possibility of parole. The maximum sentence for second-degree murder is life with the possibility of parole.

Ms. Titlow stated that she had reviewed the evidence against her, understood that the evidence supported a first-degree murder conviction, and was aware that the agreed minimum sentence of seven years exceeded her minimum sentence range derived from the applicable statutory guidelines for manslaughter. J.A. 43-53. She admitted that "in pouring the alcohol down Mr. Rogers['s] throat, [she had been] aiding Billie Rogers," J.A. 51; that in doing so she acted "in a reckless and dangerous manner which put the victim in a position of great bodily harm and/or death," J.A. 50; and that she accepted $100,000 in exchange for not talking about what had happened. J.A. 44, 50. The trial court accepted the plea and scheduled a sentencing hearing for December 19, 2001. J.A. 53.

During Ms. Titlow's confinement and prior to the scheduled sentencing hearing, Sheriff's Deputy Eric Ott initiated discussions with Ms. Titlow and advised her not to plead guilty if she was not guilty. Deputy Ott urged Ms. Titlow to retain his own attorney, Saunders Dorsey,[4] who passed the referral to Attorney Frederick Toca. Deputy Ott lost his job for interfering with Ms. Titlow's case, but was reinstated and punished by a suspension of sixty days without pay after an arbitration hearing.[5]

---

[4] In October 2002, Saunders Dorsey pleaded guilty to criminal contempt charges for aiding and abetting a former client's purchase of real estate with proceeds from the client's drug trafficking and had his license to practice law revoked. Michigan Attorney Discipline Board, *Grievance Administrator* v. *Dorsey*, Nos. 02-118-AI, 02-121-JC (July 1, 2005), *available at* http://www.adbmich.org/coveo/opinions/2005-07-01-02o-118.pdf.

[5] The information regarding Deputy Ott's interaction with Ms. Titlow and his subsequent disciplinary proceedings is contained in an affidavit from Attorney William Pierson, who represented Oakland County in the Ott arbitration hearing. The arbitrator

Exactly one month after her initial plea hearing, and on the day Ms. Rogers's trial was scheduled to begin, Ms. Titlow—now represented by Mr. Toca—moved to withdraw her plea. Mr. Toca had agreed to represent Ms. Titlow only one week before the hearing and had arranged to be compensated in the form of jewelry and the right "to sell [Ms. Titlow's] story and/or do any and all interviews, publicity, etc, related to this matter in order to help derive $100,000.00 (*80,0000*) [sic] which would serve as trial fee." J.A. 60.[6] Under the structure of the fee arrangement, Mr. Toca would only receive the full fee if Ms. Titlow went to trial.

At the motion hearing, Mr. Toca stated that the basis for withdrawing Ms. Titlow's plea was that "the offer was out of line, that seven years is outside Ms. Von Lee [sic] Titlow's guidelines." J.A. 64. Mr. Toca indicated on the record that Ms. Titlow would not testify against Ms. Rogers unless the minimum sentence was changed to three years, which was within her presumed minimum sentence guidelines range of two to five years. J.A. 64. At no point during the hearing did Mr. Toca or Ms. Titlow indicate that Ms. Titlow was withdrawing her plea because she thought she was innocent. The court granted the motion to withdraw the plea and scheduled Ms. Titlow's trial for

---

ultimately found "that the testimony of [Ms.] Titlow was more credible than that of Deputy Ott, that key components of Deputy Ott's testimony w[ere] rendered suspect or proven to be inconsistent, and that Deputy Ott [had] breached departmental rules and regulations." J.A. 298. Ms. Titlow submitted Mr. Pierson's affidavit to the Michigan Court of Appeals as an attachment to her motion to remand.

[6] When Mr. Toca was later *disbarred*, the Michigan Attorney Discipline Board cited as an aggravating factor that, in connection with this case, he "improperly acquired literary or media rights related to his client's criminal matter." J.A. 312.

January 14, 2002. J.A. 70. Mr. Toca requested more time to prepare for trial, asserting that he needed more time to get "up to speed" because he had been "retained last week." J.A. 72. The court denied Mr. Toca's request.

In the days between agreeing to represent Ms. Titlow and returning to court for the critical hearing, Mr. Toca never looked at his new client's file, spoke to her previous attorney, or undertook any other meaningful investigation into the evidence supporting the prosecution's case.[7] Had Mr. Toca simply taken the time to obtain Ms. Titlow's file prior to moving to withdraw her plea on November 29, 2001, he immediately would have seen ample evidence of her culpability and understood why she herself admitted to "aid[ing] and abet[ting]" in Mr. Rogers's death. J.A. 56. Mr. Toca would have seen a transcript of the recorded conversation in which Ms. Titlow said that she "fe[lt] guilty for killing him," J.A. 23, and that Ms. Rogers offered Ms. Titlow hush money that she accepted. J.A. 24. Mr. Toca would have seen that Mr. Chahine told the police that Ms. Rogers had previously joked about murdering her husband, J.A. 5, and that Ms. Rogers and Ms. Titlow took turns putting their hands over Mr. Rogers's face. J.A. 10-11. All of this evidence and more was detailed in an extensive preliminary examination. Finally, Mr. Toca would have seen that Ms. Titlow admitted—on the record—that the evidence against her was sufficient for a jury to find her guilty of first-degree murder. J.A. 44. In-

---

[7] In a sworn affidavit, Ms. Titlow's first attorney, Richard Lustig, stated that "Mr. Toca did not pick up the discovery materials from my office, nor discuss the facts of the case with me until January 10, 2002." J.A. 301. This affidavit was also attached to Ms. Titlow's motion to remand in the Michigan Court of Appeals.

stead, Mr. Toca neglected to obtain any of this evidence and recklessly advised Ms. Titlow to withdraw a favorable plea and proceed to trial where she faced the possibility of life without parole.

The trial of Ms. Rogers went forward. Ms. Titlow did not testify against her aunt, and the jury acquitted Ms. Rogers on December 12, 2001. Ms. Rogers died a few months later.

On December 19, 2001, Mr. Toca again requested that the court delay Ms. Titlow's trial. He stated, "I think the Court realizes that I was kind of brought into this thing at the last minute." Mot. Tr. 5, Dec. 19, 2001. At the hearing, Ms. Titlow's trial was rescheduled to begin on March 4, 2002. *Id.* at 8-9.

On February 6, 2002, less than one month before the trial was set to start, Mr. Toca moved to withdraw as counsel, citing a breakdown in communication as well as "some other issues." J.A. 80. The court chided Mr. Toca for failing to obtain transcripts from Ms. Rogers's trial and questioned the financial arrangements between him and Ms. Titlow. J.A. 82-83. Ms. Titlow stated that she had given Mr. Toca "some jewelry" and retained his services through "an agreement on a supposed[ ] . . . book deal," which had since fallen through. J.A. 84. The court allowed Mr. Toca to withdraw as counsel, and appointed Attorney William Cataldo to represent Ms. Titlow.

Trial and Sentence

Ms. Titlow's trial began on March 11, 2002. At the heart of the prosecution's case were the recorded statements of Ms. Titlow that implicated her in Mr. Rogers's murder and Mr. Chahine's testimony regarding her statements. Ms. Titlow also testified in her own defense and admitted, as she had before, that she poured vodka into the victim's mouth, held her

hand over his nose and mouth, and accepted $100,000 in hush money, J.A. 256-59, 271, but denied any role in the actual smothering. J.A. 277. None of this evidence was new or different from what was already in Mr. Lustig's case file. The jury convicted Ms. Titlow of the lesser-included offense of second-degree murder.

At Ms. Titlow's sentencing hearing on April 17, 2002, the prosecutor described Ms. Titlow as "a victim of some bad advice," and noted that he "tried to give her some good advice and her original attorney did too." J.A. 291. The prosecutor went on to say, "Mr. Cataldo did a very good job at the trial with what he had to work with." *Id.* Mr. Cataldo added, "Mr. Lustig, a very fine lawyer, was able to work the Prosecutor, renegotiate down to seven years, 7 to 15. Then Ms. Titlow received some advice and made a decision that was different." J.A. 292. Ms. Titlow stated that she:

> would have testified against Billie during her trial, *had I not been persuaded to withdraw my plea agreement* and the chance to testify, because an attorney promised me he would represent me. Even had me sign a book agreement for payment to take my case. He told me he could take my case to trial and win. . . . He told me my previous attorney was not doing enough for me. I don't know a lot about the law, . . . So I trusted what he was saying. Also, *this firm came to me. I did not go to them.* After receiving some expensive jewelry and realizing they were not going to be able to get any money out of me, they walked out on me.

J.A. 295 (emphasis added). The trial court imposed a sentence of twenty to forty years.

Michigan State Appellate Court Rulings

Ms. Titlow appealed by right. She argued, among other things, that Mr. Toca provided ineffective assistance of counsel by advising her to withdraw her plea. The Michigan Court of Appeals rejected Ms. Titlow's ineffective assistance claim, stating that Mr. Toca advised Ms. Titlow to withdraw her plea because of an alleged claim of innocence. Pet. App. 101a-102a. The state court acknowledged that the additional materials submitted on appeal, including an affidavit of William Pierson from Deputy Ott's arbitration hearing, (hereinafter "Pierson Affidavit"), should be considered "for the limited purpose of determining whether they disclose factual support for defendant's ineffective assistance of counsel claim." Pet. App. 102a. But the state court relied exclusively on the Pierson Affidavit to conclude that "[w]hen a defendant proclaims his innocence . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty." *Id.*[8]

The Michigan Supreme Court denied leave to appeal. Pet. App. 120a. Ms. Titlow subsequently filed a motion for relief from judgment, which the state trial court denied. Both the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal. *People* v. *Titlow*, No. 273274 (Mich. Ct. App. Apr. 27, 2007); *People* v. *Titlow*, 738 N.W.2d 715 (Mich. 2007).

Federal Habeas Proceedings

Ms. Titlow timely filed a petition for a writ of habeas corpus in the United States District Court for the

---

[8] The state court also denied Ms. Titlow's motion to remand for an evidentiary hearing on her ineffective assistance of counsel claim.

Eastern District of Michigan.[9] Ms. Titlow argued that the Michigan Court of Appeals erred in concluding that she was not denied her right to effective assistance of counsel at the time of her plea withdrawal and unreasonably applied *Strickland*. Pet. for Writ of Habeas Corpus 24. The district court denied relief but granted a certificate of appealability on all of her claims. Pet. App. 96a.

The Sixth Circuit reversed. Pet. App. 1a. It observed that the reason Mr. Toca offered for the plea withdrawal on the record "explicitly conflicts with the rationale on which the Michigan Court of Appeals relied," i.e., "that the plea withdrawal was based on Titlow's assertion of innocence." Pet. App. 18a-19a. On the record, Mr. Toca relied exclusively on the fact that the minimum sentence in the plea agreement exceeded the minimum sentence range under the applicable statutory sentencing guidelines. The Sixth Circuit found that the evidence from the plea withdrawal hearing rebutted the Michigan Court of Appeals' findings by clear and convincing evidence. *Id.* Turning to the *Strickland* analysis, the Sixth Circuit next found that Mr. Toca's performance during the plea-bargaining stage was deficient because he failed to examine Ms. Titlow's case file or conduct sufficient investigation before advising Ms. Titlow to withdraw her plea. Pet. App. 19a-21a. Without the discovery material, the court noted, Mr. Toca could not effectively advise Ms. Titlow about the risks involved in

---

[9] Ms. Titlow presented multiple issues in her petition, including: ineffective assistance claims with respect to her trial counsel's failure to impeach Mr. Chahine and appellate counsel's failure to raise meritorious issues on direct appeal; denial of due process arising from prosecutorial misconduct, the inadequacy of the jury instructions, and the insufficiency of the evidence presented at trial; and the constitutionality of her sentence.

withdrawing her plea. Finally, the Sixth Circuit found that Mr. Toca's deficient performance prejudiced Ms. Titlow because there was a reasonable probability that she would not have withdrawn her plea but for Mr. Toca's intervening advice. Pet. App. 22a. In support of this finding, the Sixth Circuit pointed to: the fact that the plea offer was presented to and accepted by the state trial court in October 2001; the minimum sentence Ms. Titlow received after trial—which was nearly three times longer than the minimum sentence she was offered under the plea agreement; and Ms. Titlow's testimony during the initial plea hearing *and* sentencing hearing that she would not have withdrawn the plea but for Mr. Toca's advice. Pet. App. 22a-23a. Based on those showings, Ms. Titlow satisfied the prejudice standard articulated in *Cooper*, 132 S. Ct. at 1385.

Accordingly, the Sixth Circuit held that Ms. Titlow's Sixth Amendment rights "were violated when Mr. Toca provided ineffective assistance of counsel at the plea-bargaining stage" and that "[t]he Michigan Court of Appeals' decision to the contrary unreasonably determined the facts in light of the evidence presented." Pet. App. 23a. The Sixth Circuit reversed the district court's judgment and conditionally granted the writ, requiring the State to reoffer the original plea agreement to Ms. Titlow within 90 days. The Sixth Circuit continued: "If the State in fact reoffers the plea agreement and Titlow accepts, the state court may then exercise its discretion to fashion a sentence for Titlow that both remedies the violation of her constitutional right to the effective assistance of counsel and takes into account any concerns that the State might have regarding the loss of Titlow's testimony against her aunt." Pet. App. 25a.

2012 Plea Hearing

On October 31, 2012, the parties returned to the state trial court pursuant to the Sixth Circuit's order. The prosecutor reoffered the plea agreement to Ms. Titlow. J.A. 319. Ms. Titlow accepted the plea and provided a factual basis. During voir dire, Ms. Titlow admitted that she poured alcohol into Mr. Rogers's mouth, which put him in risk of great bodily harm and contributed to his death, J.A. 322, 324, and that she accepted money from her aunt to not say anything about the crime. J.A. 323. Ms. Titlow provided the same factual basis at the October 2012 plea hearing as she did during her original plea hearing eleven years earlier. At the State's request, the trial court took the plea under advisement and stayed its proceedings pending the ruling of this Court.

SUMMARY OF ARGUMENT

In advising clients during the plea bargaining process, attorneys have critical "responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012). Here, without reviewing the significant evidence against his client, Attorney Frederick Toca advised his client to withdraw a plea—which would have spared her murder conviction—and to proceed to trial. Such outrageous conduct falls far short of what the Sixth Amendment requires.

The Michigan Court of Appeals unreasonably determined that Ms. Titlow's Sixth Amendment rights were not violated by Mr. Toca's conduct. First, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) only protects those decisions that are not contrary to or an unreasonable application of

clearly established law or are not based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1)-(2). The Michigan Court of Appeals unreasonably determined that Ms. Titlow asserted her innocence based on an affidavit from an unrelated proceeding that does not contain an assertion of innocence. Rather, all of the evidence in the record indicates that Mr. Toca blindly advised Ms. Titlow to withdraw her plea and proceed to trial. Put simply, there is no evidence to support the conclusion that Ms. Titlow retained Mr. Toca to withdraw her plea and assert her innocence—a fact that is underscored by Mr. Toca's attempt to seek a lower minimum sentence.

Additionally, the Michigan Court of Appeals' failure to inquire beyond the nonexistent claim of innocence or to analyze the substance and reasonableness of Mr. Toca's advice constitutes an unreasonable application of *Strickland*. The record demonstrates that Mr. Toca failed to conduct any investigation before advising Ms. Titlow to withdraw a highly favorable plea and to proceed to trial on first-degree murder. Mr. Toca advised Ms. Titlow without reviewing the compelling evidence of culpability contained in her case file and detailed in the course of an extensive preliminary examination: a recorded conversation in which she admitted her participation in the murder, testimony from her boyfriend regarding these confessions, and the polygraph report containing further admissions. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland* v. *Washington*, 466 U.S. 668, 690-91 (1984). No reasonable professional judgment would support the complete absence of any investigation in this case or Mr.

Toca's advice to withdraw the plea and proceed to an unwinnable trial.

Second, the question of whether a defendant's subjective testimony standing alone is enough to demonstrate a reasonable probability that she would have accepted a plea offer is not presented by this case. In addition to considering Ms. Titlow's own statements, the Sixth Circuit—consistent with the approach taken by every other circuit—considered ample objective evidence of Ms. Titlow's intent to plead guilty, including: (1) Ms. Titlow's actions in accepting the original plea, including admission on the record of her role in the crime; (2) the strength of the prosecution's evidence against her; and (3) the disparity between the sentence offered in the plea and the sentence she received after being convicted of a more serious crime. Taken together, the evidence weighed by the Sixth Circuit satisfies the *Cooper* prejudice test. The State's insistence that all of this evidence is irrelevant can only be read as an invitation to improperly heighten the *Strickland* and *Cooper* prejudice analysis.

Third, review of the remedy offered by the Sixth Circuit is premature because the state trial court has not yet acted on the reinstated plea offer. The Sixth Circuit, fully consistent with *Cooper*, explicitly left to the state court the discretion "'to vacate the conviction from trial and accept the plea *or leave the conviction undisturbed.*'" Pet. App. 25a (emphasis added). There is no reasonable reading of the Sixth Circuit's opinion that requires resentencing in all such cases or, for that matter, even requires the state court to resentence in this case. The Sixth Circuit did nothing more than quote *Cooper* itself and apply this Court's directive.

ARGUMENT

I. AEDPA DEFERENCE CANNOT PROTECT THE MICHIGAN COURT OF APPEALS' DECISION IN THIS CASE

The Sixth Circuit fully complied with the statutory commands of AEDPA when it issued the writ of habeas corpus. The decision of the Michigan Court of Appeals rested on both an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding," and "an unreasonable application of . . . clearly established Federal law." 28 U.S.C. § 2254(d)(1)-(2). In light of these factual and legal errors, the Michigan Court of Appeals' decision received all the deference that is due under AEDPA.

A. The Michigan Court Of Appeals' Decision Was Based On An Unreasonable Determination Of The Facts

The decision of the Michigan Court of Appeals turned entirely on the erroneous factual finding that Ms. Titlow withdrew her plea because she claimed her innocence. The state court found that Mr. Toca's advice to withdraw the plea "was set in motion by defendant's statement to a sheriff's deputy that [she] did not commit the offense." Pet. App. 101a. This is a grave misstatement of fact, and has plagued these proceedings ever since. In turn, this erroneous factual finding was the basis for the state court's holding that whenever "a defendant proclaims [her] innocence . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty." Pet. App. 102a.

Ms. Titlow never made any such claim of innocence. As evidence for its finding, the state court could only point to an affidavit that says nothing about Ms. Titlow claiming innocence and is wholly contradicted

by other evidence in the record. It was unreasonable for the state court to draw such a conclusion, based solely on speculation about an affidavit that was submitted only as an offer of proof in support of a remand for an evidentiary hearing[10] and contains quadruple hearsay.

According to the Michigan Court of Appeals, and the State in its opening brief, Ms. Titlow withdrew from a favorable plea deal on the eve of Ms. Rogers's trial because Ms. Titlow had become convinced of her own innocence. Pet. App. 101a; Pet. Br. 10. Simply

---

[10] While the State is correct that Ms. Titlow did not move in the trial court for an evidentiary hearing on her ineffective assistance claim, pursuant to *People* v. *Ginther*, 212 N.W.2d 922 (Mich. 1973), Pet. Br. 34, Ms. Titlow did file a timely motion to remand for a *Ginther* hearing in the Michigan Court of Appeals, which is allowable under Michigan law. *See* Mich. Ct. R. 7.211(C)(1). The affidavits Ms. Titlow submitted to the Michigan Court of Appeals were not part of the trial record, but were merely an offer of proof "for the limited purpose of determining whether they disclose factual support for defendant's ineffective assistance of counsel claim, such that remand for a *Ginther* hearing would be appropriate." Pet. App. 102a. Because the appellate court's "review of . . . ineffective assistance of counsel is limited to the facts contained in the record," *People* v. *Marji*, 447 N.W.2d 835, 839 (Mich. Ct. App. 1989), the Michigan Court of Appeals had no business reaching outside the record to decide the substance of Ms. Titlow's claim based solely on the Pierson Affidavit. A state court's misapprehension of the boundaries of the record on review "fatally undermine[s] the fact-finding process, rendering the resulting factual finding unreasonable." *Taylor* v. *Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004). At the very least, the inadequacy of the state court's fact finding process in this case should weigh strongly against giving deference to that finding. *See Teti* v. *Bender*, 507 F.3d 50, 59 (1st Cir. 2007) (quoting *Lambert* v. *Blackwell*, 387 F.3d 210, 239 (3d Cir. 2004)) (agreeing that "the extent to which a state court provides a 'full and fair hearing' . . . might be a consideration while applying deference under § 2254(d)(2)").

put, there is no evidence in the record that Ms. Titlow proclaimed her innocence, and any contrary reading of the record is unreasonable. Accordingly, the Sixth Circuit correctly concluded that the state court findings had been "rebutted by clear and convincing evidence." Pet. App. 19a.[11]

The Michigan Court of Appeals relied upon just a single piece of evidence for its finding: the Pierson Affidavit. But the Pierson Affidavit did not suggest a claim of innocence. In the Affidavit, Mr. Pierson, an attorney for Oakland County, Michigan, summarized testimony from an arbitration hearing involving Deputy Ott's violation of departmental rules when he approached Ms. Titlow and spoke with her in jail after she pleaded guilty. J.A. 298. Mr. Pierson referenced testimony taken at the arbitration hearing about Deputy Ott telling Ms. Titlow "that she should not plead guilty if she was not guilty." *Id.*

Even a cursory examination of the Pierson Affidavit reveals that these are not the words of Ms. Titlow. Further, the Affidavit does not say, or even imply, that Ms. Titlow was claiming her innocence. First, the Pierson Affidavit by its own terms only purports to recite the claims involved in the arbitration hearing and not the truth of the matter regarding the conversation between Ms. Titlow and Deputy Ott. Second, the Affidavit is a remarkable piece of quadruple hearsay in that: (1) it is an affidavit; (2) of Mr.

---

[11] Although there is disagreement among the circuits as to the relationship between sections 2254(d)(2) and 2254(e)(1), the Sixth Circuit reads the "clear and convincing" standard of (e)(1) as controlling the (d)(2) inquiry. *Benge* v. *Johnson*, 474 F.3d 236, 241 (6th Cir. 2007). *But see Taylor*, 366 F.3d at 999-1001. *Cf. Wood* v. *Allen*, 558 U.S. 290, 301-02 (2010) (declining to resolve how the provisions fit together). Regardless, the Michigan Court of Appeals' decision fails either standard.

Pierson's recollection of; (3) someone's[12] testimony about; (4) Deputy Ott's earlier statements to Ms. Titlow. Each successive layer of hearsay only adds to the unreliability of the Affidavit. See, e.g., *Boren* v. *Sable*, 887 F.2d 1032, 1036-37 (10th Cir. 1989) (noting the compounding unreliability of multiple levels of hearsay). The Pierson Affidavit offers no context for this underlying interaction between Deputy Ott and Ms. Titlow, other than the fact that *he made a statement to her* about innocence. See J.A. 298. In short, nothing in the Affidavit indicates that Ms. Titlow herself sought to affirmatively maintain her innocence. An inference that Deputy Ott must have been responding to a claim of innocence by Ms. Titlow is unsound. We do not know what transpired between Ms. Titlow and Deputy Ott.

Despite all of this, the Court of Appeals still concluded that the Pierson Affidavit was sufficient evidence—in fact, the only evidence—that Ms. Titlow "told a sheriff's deputy at the jail that [she] planned to plead guilty despite [her] protestations of innocence"—even as the court acknowledged that the record was "not fully developed on this point." Pet. App. 100a.

When a state court plainly misreads the record, its decision "reflects 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Wiggins* v. *Smith*, 539 U.S. 510, 528 (2003) (quoting 28 U.S.C. § 2254(d)(2)); see also *Taylor*, 366 F.3d at 1001 ("[When] the state courts plainly misapprehend or misstate the record in

---

[12] It is not even clear who testified to the conversation between Deputy Ott and Ms. Titlow at the arbitration hearing.

making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable.").

Even if, arguendo, the Pierson Affidavit could somehow be read as a statement of innocence by Ms. Titlow, the Michigan Court of Appeals' finding was plainly contradicted by other evidence in the record. Accordingly, the decision of the state court was unreasonable because that court "had before it, and apparently ignored," evidence that was central to Ms. Titlow's claim and contradicted the court's theory of Ms. Titlow's case. *Miller-El* v. *Cockrell*, 537 U.S. 322, 346 (2003); see also *Miller-El* v. *Dretke*, 545 U.S. 231, 246-47 (2005) (finding clear and convincing evidence to rebut state court findings where the state court "made no mention" of evidence showing that the prosecutors' strikes were racially determined).

First, as the Sixth Circuit observed, at the hearing to withdraw Ms. Titlow's plea, Mr. Toca "did not refer to [Ms.] Titlow's claims of innocence at any point." Pet. App. 18a. Instead, the only reason that Mr. Toca offered to the trial court for withdrawing Ms. Titlow's plea was the disparity in the minimum sentence under the plea agreement (seven years) and her minimum sentence range under her statutory sentencing guidelines (two to five years). *Id.*; J.A. 63-69; J.A. at 64 ("[W]e felt that the offer was out of line, that seven years is outside of Ms. Von Lee [sic] Titlow's guidelines"). Neither Mr. Toca nor Ms. Titlow made any statement to the trial court that the basis for the plea withdrawal was a desire to proceed to trial because Ms. Titlow was innocent. The Michigan Court of Appeals mentioned these statements from the plea withdrawal in passing, Pet. App. 100a, but over-

looked how this evidence contradicts the finding that the withdrawal was based on Ms. Titlow's assertion of innocence. If Mr. Toca truly was only there to withdraw the plea for a client who insisted on her innocence, and a trial to prove it, then he had no reason to state otherwise.

Second, Ms. Titlow's statements at her sentencing were equally inconsistent with an innocence claim. Ms. Titlow stated that she was "persuaded" by Mr. Toca to withdraw her plea agreement and go to trial. J.A. 295. There is no evidence in the record suggesting otherwise.

The State attempts to supplement its weak theory that Ms. Titlow continued to assert innocence by characterizing her trial as a parade of unforeseen revelations. Pet. Br. 12. But the trial revealed no important facts that had not already been disclosed to the prosecution at the time of the original plea agreement. The core of the evidence at trial was, as expected, the details contained in the recorded conversation and Mr. Chahine's testimony. Just as in her polygraph interview and at her initial hearing entering the plea, Ms. Titlow testified that she and Ms. Rogers found Mr. Rogers on the floor and poured vodka into his mouth and nose, taking turns covering his face. Ms. Titlow also admitted to accepting money from Ms. Rogers to remain silent. Trial Tr. 127, 144, Mar. 18, 2002.

Moreover, if the prosecution believed that the trial evidence made Ms. Titlow more culpable, as the State now contends, Pet. Br. 38, it is not apparent in the prosecution's closing argument, which begins with a lengthy discussion of accomplice liability—the prosecution's theory from the very beginning. Trial Tr. 6-9, Mar. 19, 2002; *id.* at 6 ("Billie Rogers is the one that actually did the smothering."). The State also

offers no argument for why any of the trial evidence it cites is relevant to the *Strickland* inquiry. This is not an instance in which "important new information about a defendant's culpability [came about] after the offer is rejected . . . ." *Cooper*, 132 S. Ct. 1376 at 1399 (Alito, J., dissenting). Indeed, the State only cites one contested statement from Mr. Chahine, offered for the first time at trial, that Ms. Titlow allegedly may have held the victim down while Ms. Rogers smothered him.[13] Pet. Br. 38. Aside from the question of whether Mr. Chahine's statement is credible in light of other evidence, it is abundantly clear from the trial record that Ms. Titlow's culpability was established largely by facts that she repeatedly admitted were true.

Finally, it is not true that Ms. Titlow "conceded" the State's innocence argument for the purposes of these proceedings, as the State repeatedly attempts to establish with a single, out-of-context sentence from a reply brief. Pet. Br. 28. First, the only "admission"

---

[13] Contrary to the State's claim that substantial new evidence was revealed during the trial, the evidence presented at trial was entirely consistent with what Mr. Lustig, Mr. Toca, and the prosecution would have known before trial. Mr. Chahine had already told police about Ms. Rogers's earlier proposals to kill her husband, J.A. 4-5, and the recorded conversation is consistent with Ms. Titlow's affirmation that there was no prior plan to kill Mr. Rogers on the evening in question. J.A. 24-25 ("I honestly to God just thought it was a big old joke at first."). In the recorded conversation, Ms. Titlow also discusses Ms. Rogers's monetary offer during the incident. *Id.* The remaining piece of "new" evidence—Mr. Chahine's testimony that Ms. Titlow had held Mr. Rogers down—is contradicted by other evidence, and, as the State has acknowledged, Mr. Chahine further testified that he did not actually know when Ms. Titlow held Mr. Rogers down—it could have been before or during the smothering. Answer in Opp'n Pet. Habeas Corpus 12 n.2, June 3, 2008, ECF No. 11.

made in this pleading was that at some point there was a statement of innocence. But based on the Pierson Affidavit, which is the only evidence of the conversation, that statement actually came from Deputy Ott, not Ms. Titlow. Indeed, the very next paragraph of the reply brief describes how it was Deputy Ott who insisted that Ms. Titlow speak with another attorney who Deputy Ott knew to be "really good." Reply Answer in Opp'n Pet. Habeas Corpus 7, July 17, 2008, ECF No. 14. Second, whatever the substance of the conversation between these two non-lawyers was, it is irrelevant to Mr. Toca's duty to conduct a reasonable investigation before advising Ms. Titlow in connection with her plea.

B. The Michigan Court Of Appeals' Decision Was Based On An Unreasonable Application Of *Strickland*

The Michigan Court of Appeals assumed that Ms. Titlow had effective assistance of counsel without a proper assessment of the reasonableness of counsel's actions. If the state court had conducted the necessary analysis under *Strickland*, it would have found sufficient evidence that Ms. Titlow's Sixth Amendment rights were violated: (1) by Mr. Toca's disastrous advice that Ms. Titlow withdraw her favorable manslaughter plea and go to trial for first-degree murder in the face of the State's strong case; and (2) by Mr. Toca's failure to make any investigation into Ms. Titlow's case before making that recommendation. In place of an assessment of the case-specific competence of Mr. Toca's investigation and advice, the state court articulated a limit on counsel's duties in representing clients who claim innocence during plea negotiations that has no basis in this Court's precedents or any cogent view of professional responsibility. All of these errors demonstrate an unrea-

sonable application of *Strickland*, and its progeny, to the facts of Ms. Titlow's claim. See *Williams* v. *Taylor*, 529 U.S. 362, 406 (2000).

1. The State Court's Assumption That Counsel's Advice To Withdraw The Plea Was Appropriate Because Ms. Titlow Supposedly Claimed Her Innocence Was An Unreasonable Application of *Strickland*

The Michigan Court of Appeals failed to adequately consider whether Mr. Toca's advice to withdraw Ms. Titlow's plea reflected even minimally competent professional judgment. Instead, the state court latched onto the purported innocence claim and held that whenever "a defendant proclaims his innocence . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty—no matter how 'good' the deal may appear." Pet. App. 102a. But in *Strickland*, this Court was clear about the necessary inquiry under the first prong of the test for ineffective assistance: "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." 466 U.S. at 690; see also, e.g., *Roe* v. *Flores-Ortega*, 528 U.S. 470, 478 (2000) (describing the "circumstance-specific reasonableness inquiry required by *Strickland*"). And the analysis is the same when a defendant is denied effective assistance during the plea-bargaining process. *Cooper*, 132 S. Ct. at 1384; *Hill* v. *Lockhart*, 474 U.S. 52 (1985).

The extent of the state court's *Strickland* analysis was to say that Mr. Toca acted as effective counsel *no matter what advice* he gave Ms. Titlow. Pet. App. 102a. This depth of inquiry cannot be squared with *Strickland*. The state court did not consider what ad-

vice Mr. Toca gave or the reasonableness of his recommendation to withdraw the plea on the eve of a co-conspirator's trial, in the face of a near-irrefutable case carrying a top charge of first-degree murder. Therefore, the "facts of the particular case" support a credible ineffective assistance claim. *Strickland*, 466 U.S. at 690. Relying on innocence as a short-cut around *Strickland* was an unreasonable application of that decision. In *Wiggins* v. *Smith*, this Court rejected a similar attempt by a state court to "automatically justif[y]" counsel's actions without considering the reasonableness of a tactical decision. 539 U.S. at 527-28 (finding a state court decision an unreasonable application of *Strickland* where the court "merely assumed" that counsel's investigation was adequate without assessing whether the decision to cease all investigation "actually demonstrated reasonable professional judgment").[14]

2. Counsel Failed To Make Any Investigation Into Ms. Titlow's Case Before Recommending The Withdrawal Of The Guilty Plea

Had the Michigan Court of Appeals assessed Mr. Toca's conduct at the time it occurred, it would have found strong evidence that Mr. Toca's representation of Ms. Titlow fell below an objective standard of reasonableness. Mr. Toca advised Ms. Titlow to withdraw her plea, while claiming that he could take Ms. Titlow's case to trial and win. J.A. 295. But before making this sales pitch and withdrawing Ms. Titlow's

---

[14] As the Michigan Court of Appeals improperly concluded that Mr. Toca did not perform deficiently in advising Ms. Titlow to withdraw her plea, it did not reach the issue of prejudice. As explained in Part II, *infra*, Ms. Titlow has satisfied *Strickland*'s prejudice prong.

plea, Mr. Toca had a duty to pick up Ms. Titlow's file, speak to Mr. Lustig, or otherwise make a reasonable investigation of the law and facts relevant to the case. *Strickland*, 466 U.S. at 690; see also *United States* v. *Soto-Lopez*, 475 F. App'x 144 (9th Cir. 2012) (holding that counsel's uninformed advice to forego a favorable plea offer based on the illusory promise of a better offer constituted ineffective assistance); *Beckham* v. *Wainwright*, 639 F.2d 262 (5th Cir. 1981) (attorney failed to advise defendant of consequences of a jury trial after he withdrew his plea). Ms. Titlow was scheduled to testify against Billie Rogers one week after Mr. Toca was retained. J.A. 53, 71. This gave Mr. Toca one week to investigate the case and make a sufficiently informed recommendation about the plea deal.

During this week, Mr. Toca neither spoke with nor picked up the case file from Ms. Titlow's original counsel, Mr. Lustig. J.A. 301; Pet. App. 20a. In fact, Mr. Toca did not obtain the case file or speak to Mr. Lustig until six weeks after the plea withdrawal. *Id.* At the plea withdrawal hearing, Mr. Toca confessed to this lack of preparedness, telling the trial court, "in all fairness, I was retained last week. There's a lot of material here." J.A. 71. Moments later, Mr. Toca asked the trial court for more time to prepare for trial in order to get "up to speed" on Ms. Titlow's case. J.A. 72.

Mr. Toca's failure to investigate Ms. Titlow's case before withdrawing her plea cannot be recast as a strategic choice of reasonable counsel. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. But no reasonable professional judgment could support Mr.

Toca's performance in this case. Ms. Titlow's plea deal depended on her testimony at Ms. Rogers's trial. Once Ms. Rogers's trial began, Ms. Titlow's chances of obtaining *any* plea deal fell to zero. Professional standards confirm that defense counsel must be aware of what benefits their client can provide the government in striking a deal. See Nat'l Legal Aid & Defender Ass'n, *Performance Guidelines for Criminal Defense Representation*, Guideline 6.2: The Contents of the Negotiations (2011), *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#sixtwo (detailing how counsel should prepare a negotiation plan). If anything, the high stakes and compressed timeframe for making a recommendation called for more—not less—investigation of Ms. Titlow's case and her potential bargaining leverage or defenses. Moreover, "the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. Mr. Toca knew that Ms. Titlow had reduced her sentencing exposure from a potential life-without-parole sentence for first-degree murder to a sentence of seven to fifteen years. Before undoing such a favorable plea deal at a point in the proceedings where a similar deal would be unobtainable, a reasonable attorney would conduct an extensive investigation, or at least *some* investigation.

There is no evidence in the record that Mr. Toca had any informed reasons for recommending such a reckless gamble. Yet there is ample evidence in the record to show that Ms. Titlow had no reasonable hope for a full acquittal. As the Sixth Circuit correctly held, the investigation before withdrawing the plea was deficient. Pet. App. 21a. There can be no "reasonable argument that counsel satisfied *Strickland*'s deferential standard" in this instance. *Harrington* v.

Richter, 131 S. Ct. 770, 788 (2011). In the end, Mr. Toca's representation of Ms. Titlow sealed her fate. Mr. Toca denied his client "'effective representation by counsel at the only stage when legal aid and advice would help [her].'" *Missouri*, 132 S. Ct. at 1408 (*citing Massiah* v. *United States*, 377 U.S. 201 (1964)).

Had Mr. Toca conducted the investigation that the Sixth Amendment demands and reviewed Ms. Titlow's file or talked to her previous attorney, he would have found ample evidence of her culpability. Before the motion to withdraw the plea, the State had at its disposal for trial: (1) the recorded conversation with Ms. Titlow and Mr. Chahine in which Ms. Titlow admitted her role in Mr. Rogers's murder, see Pet. App. 23a ("[H]er recorded conversation with her paramour Chahine was highly incriminating."); (2) Mr. Chahine's testimony and the State's other evidence, which was detailed over the course of an extensive, multi-day preliminary examination; (3) the polygraph examination administered by the police that established Ms. Titlow was an aider and abettor in the homicide; and (4) Ms. Titlow's representations at the plea hearing, where she admitted to pouring the vodka down Mr. Rogers's throat and accepting a significant amount of hush money. J.A. 43-44, 50. In the face of this evidence, the State's assertion that "[i]t was the trial itself that established Titlow's true culpability," Pet. Br. 39, is wholly unfounded. All of the prosecution's evidence was available for Mr. Toca to review if he had obtained Ms. Titlow's file or spoken to Mr. Lustig. J.A. 301. Furthermore this Court has established that *Strickland* analysis will depend solely "on the facts of the particular case, viewed *as of the time of counsel's conduct*." 466 U.S. at 690 (emphasis added). "[E]very effort [must] be made to

eliminate the distorting effects of hindsight." *Wiggins*, 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 689).

The State's reasons for sanctioning Mr. Toca's conduct fail. Pet. Br. 35. First, as discussed *supra*, the State's assertion that Ms. Titlow maintained her innocence is baseless. Second, the State argues that Ms. Titlow "passed a polygraph." *Id.* But the polygraph, which was a precondition for the State accepting Ms. Titlow's plea in the first place, was expressly designed to—and in fact did—cement the evidence of Ms. Titlow's role in the homicide. J.A. 37-40. Third, the State argues that Ms. Titlow's bargained-for minimum sentence of seven years under the plea was "substantially above" the guidelines minimum. Pet. Br. 35. This is untrue: there was a two-to-four-year disparity between the minimums. This argument also ignores the significant difference between the plea offer of manslaughter and the State's threatened charge of first-degree murder, which bears a life-without-parole sentence. Fourth, the State contends that the prosecutor said publicly that Ms. Titlow was only guilty of manslaughter. *Id.* Yet, the only support for this contention submitted by the State is a newspaper article; on the record, the prosecutor told the court that if the plea fell apart, the prosecution would proceed to trial on a first-degree murder charge, as it did. J.A. 43. Fifth, the State argues that Mr. Lustig went over all the evidence and trial risks a month prior to the plea withdrawal. Pet. Br. 35. But the State cannot rely on the efforts of previous counsel to relieve Mr. Toca of his duty to advise his client. See *Smith* v. *United States*, 348 F.3d 545, 553 (6th Cir. 2003) (although the first attorney had negotiated the plea and conveyed its terms to the defendant, "the nature and quality of the advice [the

defendant received from the second attorney] before he made his final decision" to reject the plea offer was constitutionally inadequate); *Boria* v. *Keane*, 99 F.3d 492, 497-98 (2d Cir. 1996) (reviewing only the second attorney's performance, and finding it constitutionally ineffective, where defendant was represented by one attorney during arraignment and subsequent counsel during plea bargaining). Competent counsel is necessary for any defendant to determine what the client might be guilty of, as well as what the prosecutor may be able to prove. Such assessments are at the core of the plea bargaining process. See *Premo* v. *Moore*, 131 S. Ct. 733, 741 (2011). No amount of diligence on Mr. Lustig's part could render Mr. Toca's uninformed advice sound under the Sixth Amendment or cure the prejudice caused by that reckless advice.

3. The State Court Created An Unprecedented And Ill-Advised Categorical Limit On Counsel's Duties To A Client Who Claims Innocence During Plea Bargaining

According to the Michigan Court of Appeals, Mr. Toca's advice to withdraw the plea was objectively reasonable, no matter how ill-informed or incorrect, because Ms. Titlow claimed her innocence. Pet. App. 102a. Even assuming that the record supported an inference that Ms. Titlow had claimed innocence, the state court's analysis—which, in effect, creates an "innocence exception" to the guarantee of effective assistance of counsel—has no basis in *Strickland* or the realities of professional responsibility.

This Court has never categorically limited the duties of counsel when a defendant says he is innocent. On the contrary, counsel's "overarching duty to advocate the defendant's cause" stays the same. *Strick-*

land, 466 U.S. at 688; see also *Kimmelman* v. *Morrison*, 477 U.S. 365, 380 (1986) ("The constitutional rights of criminal defendants are granted to the innocent and the guilty alike."). Prevailing professional standards, which are "guides to determining what is reasonable," *Strickland*, 466 U.S. at 688, explicitly reject the state court's two-tiered system of counsel's duties. See, e.g., Am. Bar Ass'n, *ABA Standards For Criminal Justice: Prosecution and Defense Function*, Standard 4-4.1: Duty to Investigate (3d ed. 1993), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html#4.1 ("The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.").

The Michigan Court of Appeals' analysis is equally contradicted by the reality that criminal defendants who claim innocence during plea bargaining are in the same need of advice as those who admit guilt. There are many reasons someone may choose to maintain his innocence during plea negotiations, but eventually plead guilty. A defendant might assert his innocence mistakenly because he does not understand the elements of the crime or what the prosecution must prove to make its case. See *Cooper*, 132 S. Ct. at 1383 (noting that the defendant went to trial thinking that he could not be found guilty because his counsel wrongly told him that shooting someone below the waist could not evince intent to murder). Or a defendant may assert his innocence without understanding his options in negotiating a plea or the various risks of going to trial. Cf. *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1486 (2010) (holding that counsel "must inform her client [of] whether his plea carries a risk of deportation.").

In all of these cases, defendants need competent advice from counsel that is informed by, among other things, a reasonable investigation into the facts of the case. "Plea bargains are the result of complex negotiations suffused with uncertainty," and thus the competent advice of counsel "in balancing opportunities and risks" is necessary to protect a defendant's right to make an informed choice about whether to plead guilty. *Premo*, 131 S. Ct. at 741. The State's invocation of the defendant's "ultimate authority" to plead guilty only underscores this need. Pet. Br. 31 (citing *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004)). "A guilty plea . . . is an event of signal significance in a criminal proceeding. . . . [T]he high stakes . . . require the utmost solicitude." *Nixon*, 543 U.S. at 187 (internal citations omitted). Moreover, the fact that the ultimate authority over the disposition of a criminal case belongs to the defendant has never meant that the accused ought not to have the effective assistance of counsel in exercising that authority. See *Cooper*, 132 S. Ct. at 1388. Finally, the availability of a plea under *North Carolina* v. *Alford*, 400 U.S. 25 (1970), is wholly irrelevant to a *Strickland* analysis of Mr. Toca's performance.[15] Whatever procedures govern

---

[15] Contrary to the State's assertions, Pet. Br. 31, it is not even clear that *Alford* pleas are unavailable under Michigan law. While Michigan requires a factual basis for the guilty plea, *see* Mich. Ct. R. 6.302(D)(1), this does not mean that a defendant cannot maintain his innocence. The "'factual basis for acceptance of a plea exists if an inculpatory inference can reasonably be drawn by a jury on the facts admitted by the defendant *even if an exculpatory inference could also be drawn and defendant asserts the latter is the correct inference.*'" *People* v. *Haack*, 240 N.W.2d 704, 709 (Mich. 1976) (emphasis added) (quoting *In re Guilty Plea Cases*, 235 N.W.2d 132, 145 (Mich. 1975)). While the State claims that the cases express nothing more than *obiter dictum*, Pet. Br. 32, this rule was essential to the holding in

the plea bargaining process under Michigan law, Mr. Toca had a solemn duty to conduct a reasonable investigation so that he could provide reasonable advice. Contrary to the State's assertions, the Sixth Circuit did not expect Mr. Toca to "dissuade [Ms. Titlow] from maintaining [her] innocence." Pet. Br. 32. The Sixth Circuit's expectations for Mr. Toca were those demanded by the Sixth Amendment and articulated by this Court in *Strickland* and *Cooper*. And they were expectations that were not met in this case.

II. THE SIXTH CIRCUIT'S OPINION AS TO THE REQUIRED CORROBORATION FOR MS. TITLOW'S CLAIM IS ENTIRELY CONSISTENT WITH THIS COURT'S HOLDINGS IN *COOPER* AND *STRICKLAND*

A. The Court Should Not Reach This Issue Because This Case Does Not Raise The Question Presented

1. The Sixth Circuit Considered Objective Evidence That Ms. Titlow Would Have Pleaded Guilty

Certiorari was granted to consider whether a habeas petitioner's statements, *standing alone*, can provide sufficient evidence to satisfy the *Strickland* prejudice standard. The facts of this case do not align with the question presented, however, because numerous pieces of objective evidence in the record bolster Ms. Titlow's statements that she would have pleaded guilty but for Mr. Toca's interference. Be-

---

each case and has been applied in later cases. *See, e.g., People* v. *Frazier*, 300 N.W.2d 408, 409-10 (Mich. Ct. App. 1980). The State cannot explain why a defendant who pleads guilty pursuant to a plea agreement would be subject to a different rule. Pet. Br. 32.

cause a question presented may be dismissed as improvidently granted when the case "did not turn on the issue on the basis of which certiorari was granted," the Court should not decide this question. *Smith* v. *Butler*, 366 U.S. 161, 161 (1961).[16]

Contrary to the State's and the Solicitor General's representations, the Sixth Circuit considered additional facts beyond Ms. Titlow's subjective testimony and found several pieces of objective information that together established a "reasonable probability," *Cooper*, 123 S. Ct. at 1385, that she would have accepted the plea if not for Mr. Toca's intervening advice.

First, the Sixth Circuit considered Ms. Titlow's actions as support for her words. It considered the fact that the plea offer was presented by the prosecutor, accepted by Ms. Titlow, and approved by the state trial court at her initial plea hearing in October 2001. Pet. App. 22a. It concluded that "Titlow's position that would she have accepted [sic] the plea offer but for [Mr.] Toca's intervening advice is bolstered by the fact that she had actually accepted the plea on the record at the October 2001 hearing." *Id.*

Second, the court weighed the strength of the State's evidence against Ms. Titlow. In particular, it noted the "highly incriminating" recorded conversation between Ms. Titlow and Mr. Chahine and observed that Ms. Titlow's own version of the facts dur-

---

[16] Ms. Titlow submitted her Brief in Opposition *pro se*. Accordingly, the Court did not have the benefit of a complete opposition which would have, for example, addressed "any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court" and "any objection to consideration of a question presented based on what occurred in the proceedings below." Sup. Ct. R. 15.2.

ing her in-court statements "was not inconsistent with a second-degree murder conviction." Pet. App. 23a. Given the strength of the State's case, the Sixth Circuit concluded that it was likely that if Mr. Toca had considered the evidence, he would not have advised Ms. Titlow to withdraw the plea. Pet. App. 23a (citing *Hill*, 474 U.S. at 59 for the proposition that that "the prejudice inquiry under the second prong of *Strickland* depends 'on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea'").

Finally, the Sixth Circuit considered the disparity in sentencing between the plea offer and the sentence Ms. Titlow ultimately received as evidence of prejudice. "[T]he sentence Titlow ultimately received (20-to-40 years' imprisonment) was nearly three times the punishment that she was offered under the plea agreement (7-to-15 years' imprisonment)." Pet. App. 22a.

As the Sixth Circuit explicitly cited several independent and objective facts, it is far from the case that it relied on Ms. Titlow's statements "standing alone" in concluding that there was "a reasonable probability [Ms. Titlow] would have accepted the plea." Pet. App. 16a.

2. This Case Presents No Genuine Conflict Among The Circuits

The Sixth Circuit is entirely consistent with all the other circuits in its application of the standard announced in *Cooper*. Like each of the other Courts of Appeals,[17] the Sixth Circuit weighs all the evidence

---

[17] While courts may differ in how they describe their applications of the *Strickland* and *Cooper* standards, "the minor differences in the lower courts' precise formulations of the . . . stand-

before it and assesses whether the defendant's statements provide credible evidence of his intent to accept a plea. Because there is no genuine conflict among the circuits on this issue, the Court should dismiss this question as improvidently granted. See *Bunting* v. *Mellen*, 541 U.S. 1019, 1021 (2004) (Stevens, J., joined by Ginsburg and Breyer, JJ., respecting denial of certiorari).

While it is true that the Sixth Circuit asserted in its opinion that "unlike some circuits, this court does not require that a defendant must support his own assertion that he would have accepted the offer with additional objective evidence," Pet. App. 17a (internal quotation marks omitted), that dicta is inconsistent with the court's own opinions in other matters and, as noted above, inconsistent with the rule applied here. Like all other circuits, when presented with a defendant's subjective statement that he would have taken a plea, the Sixth Circuit evaluates the credibil-

---

ard are insignificant: the different formulations are mere variations on the overarching . . . standard." *Strickland*, 466 U.S. at 696-97. All courts assess whether a defendant's post-conviction assertions are credible in light of available evidence, with only minor variations in how they conduct such an assessment. *See, e.g.*, *Moreno-Espada* v. *United States*, 666 F.3d 60, 66-67 (1st Cir. 2012); *Raysor* v. *United States*, 647 F.3d 491, 495-96 (2d Cir. 2011); *United States* v. *Day*, 969 F.2d 39, 45-46 (3d Cir. 1992); *Merzbacher* v. *Shearin*, 706 F.3d 356, 366-67 (4th Cir. 2013), *petition for cert. filed* (U.S. Apr. 25, 2013) (No. 12-9952); *Jimenez* v. *Thaler*, No. 3:11-CV-0697-B, 2011 U.S. Dist. LEXIS 150896, at *17 (N.D. Tex. Dec. 5, 2011), *adopted by Jiminez* v. *Thaler*, No. 3:11-CV-0697, 2012 U.S. Dist. LEXIS 2177 (N.D. Tex. Jan. 9, 2012); *Julian* v. *Bartley*, 495 F.3d 487, 499 (7th Cir. 2007); *Wanatee* v. *Ault*, 259 F.3d 700, 702 (8th Cir. 2001); *Nunes* v. *Mueller*, 350 F.3d 1045, 1053 (9th Cir. 2003); *Maldonado* v. *Archuleta*, 61 F. App'x 524, 527 (10th Cir. 2003); *Diaz* v. *United States*, 930 F.2d 832, 835 (11th Cir. 1991); *United States* v. *Anderson*, 705 F. Supp. 2d 1, 11 (D.D.C. 2010).

ity of that statement in order to determine whether it constitutes adequate proof to satisfy the *Cooper* standard. See *Merzbacher*, 706 F.3d at 366 (describing Sixth Circuit as adopting view that "a petitioner's own *credible* testimony that he would have accepted a plea offer combined with a disparity between the sentence offered and the sentence actually received establishes a reasonable probability that the petitioner would have accepted the plea.") (emphasis added).

The Sixth Circuit has evaluated evidence such as a defendant's unawareness that co-defendants would testify against him, as well as ignorance of the large disparity between a potential and offered sentence, as supporting the credibility of a defendant's statements. See *Griffin* v. *United States*, 330 F.3d 733, 739 (6th Cir. 2003). And in circumstances where the credibility of defendants' statements could not be determined based on record evidence, the Court has remanded such cases for evidentiary hearings. See, e.g., *Smith*, 348 F.3d at 553; *Griffin*, 330 F.3d at 739. If, as the State claims, the Sixth Circuit deemed a self-serving statement alone sufficient to provide evidence of intent, remand in such cases would be entirely unnecessary.

B. Ms. Titlow Has Amply Demonstrated A Reasonable Probability That She Would Have Accepted The Plea

Under the standard applied by any circuit, Ms. Titlow has satisfied each element of *Cooper*'s prejudice test. *Cooper* requires that a defendant demonstrate that "but for the ineffective advice of counsel there is a reasonable probability [1] that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), [2] that the court would

have accepted its terms, and [3] that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." 132 S. Ct. at 1385. The State concedes that Ms. Titlow satisfies *Cooper*'s second and third requirements. Pet. Br. 40. The State also concedes that Ms. Titlow has satisfied the second part of the first requirement, that the prosecutor would not have withdrawn the plea offer. *Id.*

Ms. Titlow also satisfied the remaining *Cooper* requirement, as she has shown a reasonable probability that but for Mr. Toca's grossly deficient performance, she would have accepted the plea. As noted above, the State is flatly incorrect in asserting that the Sixth Circuit relied only on Ms. Titlow's statements in concluding that she demonstrated a reasonable probability that she would have accepted the plea. See also S.G. Br. at 22 ("[T]he court of appeals erred in concluding that the statement *by itself* was sufficient to establish prejudice.") (emphasis added). Instead, the Court of Appeals explicitly looked to Ms. Titlow's actions in originally accepting the plea; the strength of the prosecution's case against her; and the conviction on a greater charge and higher sentence that she received after trial. Pet. App. 22a-23a.

The State attempts to minimize the record evidence regarding Ms. Titlow's willingness to accept a plea by claiming in conclusory fashion that "Titlow's acceptance of the first plea cannot be used to satisfy [the first *Cooper* prong] because Titlow withdrew the plea and maintained [her] innocence." Pet. Br. 40. The State's claim begs the question entirely by assuming incorrectly both that Ms. Titlow claimed innocence and that this was the reason she withdrew. A plea withdrawal standing alone does not vitiate the probative value of the course of the preceding plea

negotiations. Courts routinely consider the course of plea negotiations as evidence in determining whether a defendant would have taken a plea. See, e.g., *Julian*, 495 F.3d at 499 (citing that defendant "altered course at the last minute just after receiving . . . erroneous information"). Surely the culmination of those negotiations—acceptance of the plea agreement at an on-the-record hearing—should be considered by the court. The State's argument that Ms. Titlow's initial acceptance and subsequent withdrawal of the plea agreement "undercut[]" rather than support her assertion that she would have accepted the plea is backwards. Pet. Br. 43. Indeed, that the defendant proved her willingness to plead guilty by accepting a plea, and finalizing it during an on-the-record hearing, provides strong evidence of her intent to plead guilty at the time and in the absence of Mr. Toca's flawed advice.

Ms. Titlow's post-trial statements are particularly probative of her intent to plead guilty because they were first made on the record at a sentencing hearing prior to any habeas proceeding. This testimony was further supported by statements made at the same hearing by both her trial counsel and the prosecutor confirming that Ms. Titlow "[was] a victim of some bad advice" from Mr. Toca. J.A. 291-92.

Ms. Titlow's statements that she would not have withdrawn the plea but for Mr. Toca's unreasonable advice are also corroborated by the prosecution's strong evidence for its murder case, see pp. 9-10, 23-25, *supra*, and the disparity between the sentence she was offered under the plea agreement (seven to fifteen years) and the potential sentence she faced if she proceeded to trial and was convicted of first-degree murder (life without parole) or second-degree murder

(up to life imprisonment).[18] The fact that Ms. Titlow faced a near certainty of spending decades in prison if she proceeded to trial lends credence to her statements that she would not have withdrawn her plea if not convinced to do so by Mr. Toca.

Further, Ms. Titlow repeatedly and consistently stated on the record that she engaged in behavior that led to the victim's death, including at the recent plea hearing on remand from the Sixth Circuit. Contrary to the State's account of events, it was the prosecutor, not Ms. Titlow, who entered the plea hearing with the intent that the agreement not be finalized—to the surprise of Ms. Titlow and her counsel. Plea Hr'g Tr. 3-7, Oct. 31, 2012. The prosecutor began his presentation to the court by encouraging the judge *not* to accept the agreement, and instead to take it under advisement. While Ms. Titlow took issue with some of the facts the prosecutor sought to elicit from her, at no point did she insist that she was innocent of the crime. Indeed, contrary to the State's claims, she admitted to "pour[ing] . . . vodka in [Mr. Rogers's] mouth . . . [which] led to his death," J.A. 324, and "receiv[ing] money not to say anything" about the killing. J.A. 322.

In sum, Ms. Titlow has provided "credible evidence that she would have accepted a guilty plea if properly advised." See S.G. Br. 16. Ms. Titlow did in fact plead guilty when "properly advised" by her original counsel, Mr. Lustig. The State's version of the facts is belied by the fact that this original plea hearing occurred four days *after* Ms. Titlow "passed" the poly-

---

[18] For the reasons explained in Part II.C, *infra*, the State's and Solicitor General's arguments that this evidence cannot serve to corroborate Ms. Titlow's statements are unavailing.

graph examination[19]—the event that, according to the State, convinced her of her innocence. It was not until after Mr. Toca advised her to withdraw the plea—without conducting any investigation into Ms. Titlow's case and pursuant to a fee arrangement that included a perverse financial incentive to take the case to trial—that Ms. Titlow later withdrew from the plea agreement. Ms. Titlow has more than demonstrated a "reasonable probability" that she would have maintained her guilty plea if not for Mr. Toca's intervening advice to withdraw.

C. The State Improperly Urges This Court To Revisit Its Decision In *Cooper* By Requiring A More Stringent Standard For Evaluating Prejudice Claims

As explained above, there is no daylight between the standard this Court set out in *Cooper*, the Sixth Circuit's application of that standard to the facts of this case, and the method employed by federal courts in every Circuit. But the State's agenda in presenting this irrelevant issue is larger: it asks the Court to revisit its recent decision in *Cooper* and to articulate a new, stricter standard for determining whether a habeas petitioner has satisfied the *Strickland* prejudice prong in the context of a foregone plea offer. The Court should reject the State's entreaty to reconsider the prejudice standard it established in *Strickland* and recently reaffirmed in *Cooper*.

In determining whether there is a reasonable probability that the outcome would have been different, "a court hearing an ineffectiveness claim must consider

---

[19] The polygraph examiner concluded that Ms. Titlow was being truthful when she admitted to aiding and abetting Ms. Rogers in Mr. Rogers's death but denied being the principal actor. J.A. 38-39.

the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695 (emphasis added). The State asks this Court to adopt a radically new standard that would require habeas petitioners to present separate pieces of evidence that are independently sufficient to satisfy each element of the *Cooper* standard. Pet. Br. 40. The State's proposal is inconsistent with the standard set out in *Strickland*, and should be rejected.

The State pursues a rule against subjective statements in an attempt to replace the *Strickland* and *Cooper* totality standard with a more stringent one that discredits habeas petitioners' statements altogether. The State asks this Court, as it did unsuccessfully before the Sixth Circuit in *Cooper*, to impose just such a *per se* rule. Pet. Br. 42; see *Cooper* v. *Lafler*, 376 F. App'x 563, 571 (6th Cir. 2010), *vacated and remanded by Cooper*, 132 S. Ct. at 1384 (2012).

The State offers no justification to deny a reviewing court the ability to weigh all the evidence before it to determine whether a habeas petitioner's assertions are credible. A habeas petitioner's subjective statement often provides a key component of the evidentiary package that courts consider in determining whether he has demonstrated by a reasonable probability that he would have accepted a plea offer. In fact, in some cases, courts have rejected a habeas petitioner's claim of prejudice because he *failed* to provide a statement attesting that he would have accepted a plea, underscoring the evidentiary value of such statements. See, e.g., *Toro* v. *Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991) (rejecting petitioner's claim because he never averred that he would have taken the plea: "The memorandum merely states: '[Toro] would have to have been insane not to accept the plea agreement for the minimum sentence.'"); *Di-*

az, 930 F.2d at 835 (reasoning that defendant needed to do more than "argue[ ] only that he would have received a lesser sentence had he accepted the plea agreement.").

The State attempts to needlessly complicate an otherwise straightforward practice of determining credibility. For example, the State suggests that because the final element of the *Cooper* test "*always* requires a defendant to show a disparity,[20] . . . sentencing disparity is a given" and cannot be used as additional objective evidence to support the credibility of subjective testimony. Pet. Br. 40; see also S.G. Br. 23 (suggesting that sentencing disparities can only be considered when the counsel's advice is regarding the potential sentences). The State's and the Solicitor General's arguments miss the point. The *degree* of the sentencing disparity between the plea offer and the potential sentence the defendant faces if he were to be convicted following trial serves as a valuable piece of evidence in the court's credibility analysis, because the greater this disparity, the more likely it is that the defendant would have accepted the plea. See *Raysor*, 647 F.3d at 495-96; *Smith*, 348 F.3d at 552; *United States* v. *Gordon*, 156 F.3d 376, 380-381 (2d Cir. 1998) (per curiam); *Day*, 969 F.2d 39. Like all evidence in the record, the reviewing court may take the degree of sentencing disparity into account when determining the credibility of the defendant's testimony. The State's attempt to draw inflexible rules into *Cooper*'s standard is completely inconsistent with *Strickland*. See *Strickland*, 466 U.S. at 696 ("Most

---

[20] This statement itself is inaccurate, as *Cooper* describes this element as a reasonable probability "that the *conviction or* sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." 132 S. Ct. at 1385 (emphasis added).

important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules."). A *per se* rule preventing a reviewing court from weighing a habeas petitioner's statements about his intentions would impair the court's ability to make credibility determinations based on the totality of the evidence before it, as the *Strickland* standard requires.

III. THE SIXTH CIRCUIT'S REMEDY FAITHFULLY APPLIED *COOPER*

A. Review Of This Question Is Premature

Whether *Cooper* always requires resentencing is neither presented nor ripe for decision in this case. The Sixth Circuit did not require the state trial court to resentence Ms. Titlow. The court gave the State ninety days to reoffer the original plea agreement to Ms. Titlow or release her from custody; the State elected to reoffer the agreement, and Ms. Titlow accepted it on October 31, 2012. J.A. 319. Yet, because the Michigan trial court stayed its proceedings pending the decision of this Court, at this stage it is impossible to know whether the trial court will ever resentence Ms. Titlow or what the remedy may be. The Michigan court has not yet accepted the plea and remains free to reject it under the express terms of the Sixth Circuit's order. Nothing in the Sixth Circuit's order limits the state court's discretion beyond the procedures already outlined in *Cooper*.

As the Sixth Circuit described, "[i]f the state in fact reoffers the plea agreement and Titlow accepts, the state court *may then* exercise its discretion to fashion a sentence for Titlow." Pet. App. 25a (emphasis added). The state court's discretion includes the ability "'to vacate the conviction from trial and accept the

plea *or leave the conviction undisturbed.*'" Pet. App. 24a (emphasis added). The Sixth Circuit thus made explicit the possibility that the sentencing court might not change Ms. Titlow's sentence at all. This comports both with Michigan state rules and this Court's holding in *Cooper*. See *Cooper*, 132 S. Ct. at 1391; Mich. Ct. R. 6.302(C)(3) ("If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may (a) reject the agreement; or (b) accept the agreement . . . ."). Even the State acknowledges that the Sixth Circuit's ruling keeps intact the Michigan trial court's discretion to "leave undisturbed Titlow's trial conviction and sentence." Pet. Br. 48.

The answer to the State's third question presented, therefore, is "no"—*Cooper* does not, by its own terms, require resentencing, nor did the Sixth Circuit require resentencing here. The controversy that the State's brief contemplates, namely that "the Sixth Circuit erroneously created an entirely new scheme for fashioning a *Lafler* remedy," simply is not present. Pet. Br. 46. Neither does the State offer any other basis for its bizarre reading of the Sixth Circuit's order. This question could be ripe *only if* the state court were to accept Ms. Titlow's plea (which has not yet occurred), and *only if* the state court were to do so based on an understanding that it had no other choice under the Sixth Circuit's order or under *Cooper*. In fact, however, neither of those vital "ifs" have come to pass. As was the case in *California* v. *Rooney*, "[t]here are two too many 'ifs' in that proposition to make . . . review appropriate at this stage," 483 U.S. 307, 312–13 (1987), and the Court should therefore dismiss certiorari as to this question as im-

providently granted. See *Rogers* v. *United States*, 522 U.S. 252, 259 (1998) (O'Connor, J., concurring in result) (the Court "ought not to decide the question if it has not been cleanly presented."); see also, e.g., *McClanahan* v. *Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971) (dismissing certiorari as improvidently granted where "the record does not adequately present [the] question"); *McCarthy* v. *Bruner*, 323 U.S. 673 (1944) (same).

B. No Controversy Exists As To The Proper Meaning And Application Of *Cooper*

In the two years since this Court's decision in *Lafler* v. *Cooper*, no disputes have emerged as to *Cooper*'s effect on the ways in which state courts may remedy Sixth Amendment violations. There is good reason for this lack of controversy: *Cooper* affirmed state courts' discretion in this area, avoiding potential federalism problems and allowing for flexibility in its application to specific facts. This case only serves to demonstrate that flexibility. Here, the Sixth Circuit unambiguously left open the possibility that the state court might not accept the original plea agreement, especially in light of "any concerns that the State might have regarding the loss of [Ms.] Titlow's testimony against her aunt." Pet. App. 25a. Nothing prevents the State from arguing that the court should not accept the plea, just as nothing prevents Ms. Titlow from arguing to the state court that Mr. Toca's constitutionally deficient representation was the reason for both her plea withdrawal and the prosecution's subsequent loss of her testimony.

In the absence of any disagreement or confusion, it is too soon to preempt *Cooper*'s observation that "[p]rinciples elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors

that should bear upon the exercise of the judge's discretion [to determine a remedy]." *Cooper*, 132 S. Ct. at 1389.

C. The Sixth Circuit Properly Applied *Cooper*

Here, the Sixth Circuit did not order the state court to resentence Ms. Titlow—it required the State to "reoffer Titlow the original plea agreement or, failing that, to release her. If the State in fact reoffers the plea agreement and Titlow accepts, the state court *may then* exercise its discretion to fashion a sentence for Titlow that both remedies the violation of her constitutional right to effective assistance of counsel and takes into account any concerns that the State might have regarding the loss of Titlow's testimony against her aunt." Pet. App. 25a (emphasis added). The Sixth Circuit also observed that if the agreement were reoffered by the State and accepted by Ms. Titlow, "the state trial court would then have the discretion 'to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.'" Pet. App. 24a.

The State incorrectly asserts that the phrase "fashion a sentence" somehow means that the Sixth Circuit ordered resentencing. See Pet. Br. 47 ("[T]he Sixth Circuit indicated that the trial court should 'exercise its discretion to *fashion a sentence*' for Titlow.") (emphasis added). As quoted above, however, the Sixth Circuit's language was conditional ("the state court *may then* exercise its discretion to fashion a sentence"), and the Sixth Circuit made clear that the state court had the discretion to "leave the conviction undisturbed." Pet. App. 24a. Accordingly, there is no reasonable reading of the Sixth Circuit's opinion that requires resentencing in all such cases or, for that matter, even requires resentencing in this case. The

Sixth Circuit did nothing more than quote *Cooper* itself, and its decision simply reiterates this Court's directive.

The State and *Amici* also distort the Sixth Circuit's holding by overemphasizing its statement that the trial court should "'consult' the plea agreement" as a "baseline" when fashioning a remedy. Pet. App. 24a-25a. The Sixth Circuit explained that this suggestion was based on the court's concern about the potential for the *Cooper* remedy to "become illusory *if* the state court chooses to merely reinstate [Ms.] Titlow's current sentence." *Id.* (emphasis added). Besides the fact that the Sixth Circuit was again quoting *Cooper*, it was doing so within a discussion of how the trial court might exercise its discretion over Ms. Titlow's sentence if she and the state court accepted the reoffered plea agreement. This consultation is appropriate because the state court may exercise its "discretion in all the circumstances of the case." *Cooper*, 132 S. Ct. at 1391. Consultation of a plea agreement by a state court in light of *Cooper* is hardly a novel suggestion, and is certainly a necessary step in the process of shaping any appropriate remedy.[21]

Finally, the Sixth Circuit's opinion likewise provides no basis for the *Amici* States' complaint that resentencing here would "unnecessarily infringe[] upon . . . competing interests" in appropriate convictions and sentences. Br. of Conn., et al. 11. In articulating Ms. Titlow's remedy, the Sixth Circuit did not disregard the State's competing interests. As this Court

---

[21] Furthermore, these statements are dicta, and were not central to the Sixth Circuit's reasoning. They were "unnecessary to the judgment and . . . not binding." *S. Union Co.* v. *United States*, 132 S. Ct. 2344, 2352 n.5 (2012) (citing *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006)).

stated in *Cooper*, "a remedy must 'neutralize the taint' of a constitutional violation, while at the same time not grant a windfall to the defendant . . . ." 132 S. Ct. at 1388 (internal citation omitted) (quoting *United States* v. *Morrison*, 449 U.S. 361, 365 (1981)). A windfall does not await Ms. Titlow in the trial court. Rather, the Sixth Circuit directly contemplated that if the trial court alters her sentence, its remedy will "take[] into account any concerns that the State might have regarding the loss of Titlow's testimony against her aunt." Pet. App. 25a. This exactly comports with *Cooper*. 132 S. Ct. at 1388 ("Sixth Amendment remedies should be 'tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'" (quoting *Morrison*, 449 U.S. at 364)).[22]

D. The State's Interest In Determining The Appropriate Remedy For A Sixth Amendment Violation Is Minimal

If this Court were nonetheless inclined to revisit its recent holding in *Cooper* as to the remedial scope, the remedy question should be re-litigated in full. If anything, the *Cooper* remedy should be made clearer and more specific to ensure that habeas petitioners whose counsel have been found to be constitutionally ineffective are not left with no remedy whatsoever.

---

[22] The State's complaint about the order in this case is curious for the additional reason that the Sixth Circuit's adherence to *Cooper* reflects a retrenchment from broader remedial orders. *See, e.g.*, *Lewandowski* v. *Makel*, 949 F.2d 884, 889 (6th Cir. 1991) (ordering specific performance of original plea bargain and sentence as the "only way to effectively repair the constitutional deprivation" suffered by withdrawal of plea on advice of constitutionally ineffective lawyer).

The State exaggerates its own interest in the proper remedy for Ms. Titlow's Sixth Amendment violation. Although Ms. Titlow can no longer provide the State with the agreed-to benefit of the plea bargain (specifically, testimony against her aunt, Billie Rogers), her Sixth Amendment rights are not contingent upon bartering with the State. The proper remedy for a Sixth Amendment violation should not look to wholly post hoc events, just as *Strickland*'s deficiency prong insists that we look to the attorney's conduct at the time the relevant decisions were made. Indeed, as this Court has stated, "[t]he Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel." *Kimmelman*, 477 U.S. at 379. In remedying Sixth Amendment violations, then, the focus is properly on the defendant whose rights were violated, not whatever benefit the State negotiated in a plea deal. Conditioning Ms. Titlow's constitutional relief on the relative value of her lost testimony would strongly conflict with the history of habeas corpus, and would mark a radical departure from the decisions of this Court, not the least of which is *Cooper* itself. Relief correcting constitutional deprivations is not subject to such a balancing test.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JEFFREY T. GREEN
KAREN S. SMITH
BRIAN A. FOX
BENJAMIN B. GLERUM
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8000

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV.
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

VALERIE R. NEWMAN*
JESSICA L. ZIMBELMAN
STATE APPELLATE
DEFENDER OFFICE
645 Griswold Street
Suite 3300
Penobscot Building
Detroit, MI 48226
vnewman@sado.org
(313) 256-9833

Counsel for Respondent

July 17, 2013

* Counsel of Record

REPLY BRIEF

RECORD
AND
BRIEFS

No. 12-414

In the Supreme Court of the United States

SHERRY BURT, PETITIONER

v.

VONLEE TITLOW

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Aaron D. Lindstrom
Assistant Solicitor General

Raina Korbakis
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

Law Library

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Introduction 1

Argument 3

I. The Michigan Court of Appeals' decision is entitled to AEDPA deference. 3

A. Titlow has already conceded that the Michigan Court of Appeals did not unreasonably determine the facts. 3

B. The Michigan Court of Appeals did not unreasonably apply this Court's clearly established precedent. 8

C. Titlow's remaining arguments fail to satisfy AEDPA. 10

II. There is no credible, objective evidence that ineffective assistance caused Titlow to withdraw the plea and go to trial, a necessary prerequisite to a *Lafler* claim. 14

III. This Court needs to clarify the appropriate remedy for ineffective assistance in rejecting a plea. 18

Conclusion 22

TABLE OF AUTHORITIES

Page

Cases

Cullen v. *Pinholster*,
131 S. Ct. 1388 (2011) 10

Ebron v. *Commissioner of Correction*,
53 A.3d 983 (Conn. Sup. Ct. 2012) 20

Griffin v. *United States*,
330 F.3d 733 (6th Cir. 2003) 15

Harrington v. *Richter*,
131 S. Ct. 770 (2011) 8

Johnson v. *Uribe*,
700 F.3d 413 (9th Cir. 2012) 20, 21

Johnson v. *Williams*,
133 S. Ct. 1088 (2013) 8

Jones v. *United States*,
2012 WL 5382950 (6th Cir. Nov. 5, 2012) 20

Lafler v. *Cooper*,
132 S. Ct. 1376 (2012) ..... passim

Merzbacher v. *Shearin*,
706 F.3d 356 (4th Cir. 2013) 14

Metrish v. *Lancaster*,
133 S. Ct. 1781 (2013) 1, 13

Missouri v. *Frye*,
132 S. Ct. 1399 (2012) 14, 17

Smith v. *United States*,
348 F.3d 545 (6th Cir. 2003) 15

Stop the Beach Renourishment, Inc. v. *Florida Dep't of Envtl. Protection*,
130 S. Ct. 2592 (2010) 19

Strickland v. *Washington*,
466 U.S. 668 (1984) ..... passim

Statutes

28 U.S.C. § 2241 *et seq*..... passim

28 U.S.C. § 2254..... 7

28 U.S.C. § 2254(d)(1)..... 1, 7, 9, 13

28 U.S.C. § 2254(e)(1)..... 4, 6, 13

Rules

Mich. Ct. R. 7.216(A)(4)..... 5

Mich. Ct. R. 7.216(A)(6)..... 5

Sup. Ct. R. 15.2..... 4, 19

INTRODUCTION

To obtain federal habeas relief, Titlow must demonstrate that the Michigan Court of Appeals unreasonably applied this Court's "clearly established" precedent. 28 U.S.C. § 2254(d)(1). This difficult-to-meet standard requires Titlow to show that the Michigan Court of Appeals' ruling rested on "an error well understood and comprehended in existing law[,] beyond *any possibility* for fairminded disagreement." *Metrish* v. *Lancaster*, 133 S. Ct. 1781, 1786–87 (2013) (emphasis added, quotation omitted).

Fairminded jurists could reasonably reach the same conclusion as did the Michigan Court of Appeals, i.e., that attorney Toca was not ineffective for allowing Titlow to maintain innocence. And Titlow identifies no clearly established case law that the Michigan Court of Appeals unreasonably applied.

Instead, Titlow disclaims the factual predicate. For the very first time in this litigation, Titlow asserts that there *was* no claim of innocence. E.g., Resp. Br. 3, 4, 16, 18–23, 31. But Titlow has already admitted that predicate fact. In the district court, Titlow's reply brief began by acknowledging the state court's factual determination: "the second attorney's advice was set in motion by defendant's statement to a sheriff's deputy that [Titlow] did not commit the offense." Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 7. Titlow's brief then continued:

> Petitioner [Titlow] does not quibble with this finding. *It is true that a statement of innocence set in motion the second attorney's advice.* [*Id.* (emphasis added).]

Having conceded the predicate fact below, Titlow is forced to argue that everything would have been different if only attorney Toca had reviewed the entire file before advising Titlow to withdraw the plea. But this argument suffers from additional fatal defects: (1) there is not an iota of evidence that attorney Toca even advised Titlow to withdraw the plea, (2) Titlow's first attorney had already gone over all of the evidence with Titlow before Titlow initially made the plea, and (3) there is no amount of "investigation" Toca could have undertaken (in a three-day window, no less) that would have changed Titlow's mind. In sum, the hardest part of this case may be deciding on which ground to reverse the Sixth Circuit's grant of habeas relief.

There are also two important non-AEDPA legal principles at stake. First, the Court should resolve the circuit split regarding how to prove *Strickland* prejudice in the rejected-plea context. A defendant alleging that he would have accepted a plea but for ineffective assistance should be required to produce credible, objective evidence that a defendant would have pleaded guilty but for counsel's bad advice. Pet. Br. 39–43; U.S. Br. 16–21. Titlow has never proffered such evidence. Pet. Br. 42, 43–45; U.S. Br. 21–24.

Second, nothing in this Court's decision in *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), suggests that a state trial court lacks discretion to impose the post-trial sentence, or that the trial court has authority to fashion a new sentence altogether in this context. Pet. Br. 46–51; U.S. Br. 24–32. Yet the Sixth and Ninth Circuits have said precisely those things. For all these reasons, this Court should reverse.

ARGUMENT

I. The Michigan Court of Appeals' decision is entitled to AEDPA deference.

A. Titlow has already conceded that the Michigan Court of Appeals did not unreasonably determine the facts.

If the Michigan Court of Appeals reasonably found that Titlow's "second attorney's advice was set in motion by defendant's statement to a sheriff's deputy that he did not commit the offense," Pet. App. 101a, then there is very little over which to argue under AEDPA. That reality compels Titlow to change course and attack that factual predicate for the very first time in these proceedings. Resp. Br. 3 ("nonexistent claim of innocence"); *id.* at 18 ("Titlow never made any such claim of innocence"); *id.* at 31 ("the State's assertion that Ms. Titlow maintained her innocence is baseless"); accord, e.g., *id.* at 4, 16, 18–19, 20, 21, 22, 23, 31.

Titlow's vehement denials are belied by the briefing in the federal district court below. In answer to Titlow's habeas petition, the State argued that the federal court on habeas review was bound by the state court's factual determination that "the second attorney's advice was set in motion by defendant's statement to a sheriff's deputy that he did not commit the offense." Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 7. In response, Titlow said: "Petitioner does not quibble with this finding. It is *true* that a statement of innocence set in motion the second attorney's advice." *Id.* (emphasis added). Having already conceded this point expressly below, Titlow cannot take the opposite position now.

Titlow castigates the State for relying on "a single, out-of-context sentence from a reply brief." Resp. Br. 24. But it is difficult to imagine a more context-specific admission. In the reply brief, Titlow was responding to the State's assertion that the federal habeas court was bound by the Michigan Court of Appeals' fact finding. And Titlow did not "quibble with this finding." Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 7.

Titlow impliedly repeated this concession at the certiorari stage. In the petition for certiorari, the State referenced Titlow's claim of innocence several times, e.g., Pet. 2, 10, 18, 24, 28, and Titlow did not object. Under this Court's rules, Titlow was obligated "to point out in the brief in opposition, *and not later*, any perceived misstatement made in the petition." Sup. Ct. R. 15.2 (emphasis added). It is far too late for Titlow to be changing the factual basis on which this case has been litigated.[1]

Far more important, Titlow—like the Sixth Circuit—misapprehends the applicable standard of review in habeas. Under AEDPA, a state-court determination of a factual issue "shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). It is Titlow's burden to rebut this "presumption of correctness by clear and convincing evidence." *Id.* And Titlow cannot satisfy that lofty standard here, wholly aside from this factual concession below.

---

1 Although Titlow asserts that the brief in opposition was *pro se*. Resp. Br. 36, n.16, Rule 15.2 does not make that distinction. And while Titlow signed the brief in opposition, Titlow apparently had assistance from counsel, who filed Titlow's certificate of service in this Court.

The Michigan Court of Appeals based its factual finding on William Pierson's affidavit, evidence that *Titlow* submitted in the state-court proceedings. In what can only be called chutzpah, Titlow now chides the state court for relying on that affidavit, which Titlow says is "outside the record." Resp. Br. 19, n.10. But the Michigan Court of Appeals may at any time, in its discretion, "permit . . . additions to the transcript or record" and "draw inferences of fact." Mich. Ct. R. 7.216(A)(4), (6). Having asked the state court to consider and rely on the affidavit, Titlow is hardly in a position to complain after the state court did exactly that.

Moreover, in the lower federal courts, Titlow never challenged the Pierson affidavit's relevance or reliability. Instead, Titlow told the federal district court that "[t]here is nothing in the state court opinion indicating that Attorney Pierson's affidavit was unreliable." Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 8. And it was reasonable for the state court to infer from the affidavit that Titlow was proclaiming innocence; it would make no sense for Deputy Ott to tell Titlow not to plead guilty *unless* Titlow was maintaining innocence.

Of course, the Pierson affidavit was not the only evidence that Titlow was maintaining innocence. Titlow so testified before, during, and after trial:

- On the Chahine wiretap, Titlow said that Billie was "the one that poured the Vodka in [Don's] mouth. She did most everything and she even told me, she said, 'I did all the work'. . . . 'Cause I [Titlow] couldn't do it." [J.A. 18–19];

- When taking the polygraph test, Titlow denied killing Don or planning Don's death [J.A. 38–39];

- At trial, Titlow repeatedly denied any culpability for Don's death [J.A. 257, 259, 261, 268, 270];

- And after the Sixth Circuit remanded this case to allow Titlow to accept the plea deal, Titlow still continued to maintain innocence [J.A. 320–25].

Under AEDPA, the federal courts' inquiry is not whether this evidence adequately supported the state-court factual finding. The test is whether Titlow came forward with "clear and convincing evidence" that rebutted the "presumption of correctness" that attached to the Michigan Court of Appeals' factual finding. 28 U.S.C. § 2254(e)(1). Both Titlow's standard—"plainly contradicted," Resp. Br. 22–23—and the Sixth Circuit's standard—"sufficiently rebut[ted]," Pet. App. 18a—are quite different than AEDPA's "presumption of correctness" standard.

And, like the Sixth Circuit, Titlow offers only one purportedly contradictory fact: that Toca did not mention innocence at the plea-withdrawal hearing and instead focused on the length of the negotiated sentence. Resp. Br. 22–23. But these two motives are hardly mutually exclusive. Toca's hearing comments do not indicate *what* motivated Titlow to withdraw the plea, or whose idea it was to withdraw the plea.

In fact, Titlow and the Sixth Circuit ignore entirely that the Michigan Court of Appeals *also* found that Titlow withdrew the plea "because the agreed upon sentence exceeded the sentencing guidelines range." Pet. App. 100a. Thus, Toca's comments hardly constitute the kind of "clear and convincing evidence" that Congress would have envisioned as sufficient to (1) rebut AEDPA's presumption of correctness, and (2) set aside a jury's state-court murder conviction.

Titlow's only other rebuttal consists of self-serving statements following the conviction. These unsworn, post-conviction statements at sentencing—wrongly referred to by Titlow and the Sixth Circuit panel majority as "testimony," Resp. Br. 41—were not *evidence* of anything other than plea bargainer's remorse. There was no basis to say that Titlow overcame § 2254's presumption of correctness.

In sum, there is nothing in the record—much less "clear and convincing evidence"—that rebuts the "presumption of correctness" AEDPA attaches to the Michigan Court of Appeals' fact findings. And it stands AEDPA on its head for a federal court to grant habeas relief based on a factual theory the habeas petitioner never supported or even preserved in the state court or the federal district court.

Lacking a fact-based avenue for relief, Titlow is left to challenge the Michigan Court of Appeals' legal conclusion, a conclusion that is also cloaked with AEDPA deference. 28 U.S.C. § 2254(d)(1). This is a tall and difficult hurdle, and Titlow does not come close to clearing it.

B. The Michigan Court of Appeals did not unreasonably apply this Court's clearly established precedent.

Titlow does not argue that the Michigan Court of Appeals' decision was "contrary to" this Court's clearly established precedent in *Strickland*. So the only question is whether the state court unreasonably applied that precedent. The Sixth Circuit did not make such a determination, nor could it. That is because Titlow proffered no evidence—as is a habeas petitioner's burden—that Toca even advised Titlow to withdraw the plea, as opposed to following Titlow's directive that the plea be withdrawn.

For example, if Titlow wanted to argue that Toca advised that withdrawing the plea was the best strategic decision, Titlow was required to make that argument in the state-court system by submitting a sworn affidavit. Titlow never did that, presumably because Toca did not give that advice. AEDPA does not authorize the Sixth Circuit to hypothesize about what happened in the state-court proceedings, and yet that is precisely what the Sixth Circuit did.

Titlow also gripes about the "extent" and "depth" of the state-court analysis. Resp. Br. at 26. As a threshold matter, this point is immaterial, because a state court need not give any reasons for its decision. *Harrington* v. *Richter*, 131 S. Ct. 770, 784–785 (2011); *Johnson* v. *Williams*, 133 S. Ct. 1088, 1096 (2013) ("When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits. . . .").

More important, Titlow's argument improperly shifts the burden of proof to the State and the state-court system. It was (and remains) *Titlow's* burden to identify this Court's clearly established precedent and explain how the Michigan Court of Appeals unreasonably applied that precedent. 28 U.S.C. § 2254(d)(1). It is not the State's burden to *disprove* an unreasonable application of this Court's clearly established precedent.

The Sixth Circuit's upside-down analysis is manifest when that court says that the record in this case "contains no evidence that Toca explained the elements necessary for the government to secure a conviction, discussed the evidence as it bears on those elements, or explained the sentencing exposure the defendant would face as a consequence of exercising each of the options available." Pet. App. 19a (quotation omitted). The proper question is whether the record contains evidence—such as a sworn Titlow affidavit—that Toca did *not* do those things. And the answer is "no." Yet on the basis of that record silence, the Sixth Circuit concluded that "Toca's performance during the plea bargaining stage was clearly deficient." Pet. App. 21a.

Compounding its error, the Sixth Circuit ignored this Court's *Strickland* presumption. Under *Strickland*, a court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* v. *Washington*, 466 U.S. 668, 669 (1984). So the Sixth Circuit should have presumed that Toca properly *advised* Titlow about the risks of withdrawing the plea and going to trial.

Instead, the Sixth Circuit presumed the exact opposite: that Toca did not do his job. And it is this presumption of *in*effectiveness that contravenes this Court's clearly established precedent, not any holding of the Michigan Court of Appeals. See *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1403 (2011) (under AEDPA and *Strickland*, a federal habeas court's review of a state court's ineffective-assistance decision is "doubly deferential").

C. Titlow's remaining arguments fail to satisfy AEDPA.

Having cast aside the governing legal standards, Titlow feels free to continue advancing positions that have no factual tether to the record of this case. The thrust of Titlow's argument is that Toca's failure to adequately investigate caused Toca to render "the disastrous advice that Ms. Titlow's Sixth Amendment rights were violated." Resp. Br. 25. Accord *id.* at 26 ("Toca's advice to withdraw Ms. Titlow's plea"); *id.* at 27 ("Toca advised Ms. Titlow to withdraw her plea"); *id.* at 29 (Toca had no "informed reasons for recommending such a reckless gamble"); *id.* at 32 ("Toca's advice to withdraw the plea"). Again, the problem is that there is no record evidence—none—that Toca actually gave that advice or, if he did, in what context he gave it.

Titlow's failure to provide any sworn testimony is fatal. Maybe Toca conveyed to Titlow how strong the prosecutor's case was, maybe not. Under AEDPA, the absence of evidence either way required the Sixth Circuit to reject Titlow's habeas claim. And the lack of sworn testimony is also a basis for rejecting out of hand the saga Titlow's merits brief portrays.

Notably, neither the State nor the Michigan Court of Appeals has endorsed a "categorical" legal standard that relieves an attorney from his duty to investigate before making a plea recommendation. Contra Resp. Br. 32–35. The problem is the lack of evidence that Toca made any recommendation at all. As Sixth Circuit Chief Judge Batchelder explained in her dissent, Titlow "has not presented any evidence indicating that Toca advised [Titlow] to withdraw [Titlow's] plea or that [Toca] was otherwise a decisive factor in [Titlow's] decision to go to trial." Pet. App. 27a (Batchelder, C.J., dissenting).

Even if one improperly assumes that Toca did advise Titlow to withdraw the plea, there is no evidence suggesting that Titlow would have reached a different decision if only Toca had properly investigated in the narrow, three-day window before Titlow had to withdraw the plea. (As noted in the State's principal brief, the record shows that Toca was retained three days—not one week as Titlow claims, Resp. Br. at 28—before Billie's trial was to begin.)

First, Titlow already knew everything Toca could have possibly "investigated." Titlow's first attorney, Lustig, had gone over those exact same facts with Titlow less than one month earlier and advised Titlow about the potential risks of going to trial versus accepting the plea offer. J.A. 43, 44. And Titlow admitted, under oath, to understanding that a jury could find Titlow guilty of murder based on those very facts. J.A. 44.

Second, Toca knew that (1) Titlow was maintaining innocence, (2) Titlow had passed a polygraph, (3) Titlow's minimum sentence under the plea was substantially above the guidelines sentence for a manslaughter charge, (4) the prosecutor publicly said (before the plea withdrawal) that his analysis revealed Titlow was only "guilty of manslaughter," and (5) Titlow's previous attorney had gone over all of the evidence and trial risks with Titlow less than one month earlier. Pet. Br. 35. There is nothing in the record that suggests further investigation would have allowed Toca to change Titlow's mind.

Third, it was not until the trial that Titlow's culpability for murder crystalized. Titlow now says that Lustig's file contained "ample evidence" of Titlow's culpability. Resp. Br. at 30. But earlier in these same proceedings, Titlow argued just the opposite: that the evidence was "by no means overwhelming," that Titlow's comments on the recording with Chahine were "ambiguous," and that "[t]hroughout the tape" Titlow maintained Billie was the murderer, not Titlow. Br. in Support of Pet. for Writ of Habeas Corpus 40, 53.

The most damaging evidence against Titlow was not in attorney Lustig's file at all. It was Chahine's surprise trial testimony and Titlow's disastrous cross-examination performance. Pet. Br. at 38–39. Titlow tells this Court that Chahine's testimony was of no consequence. Resp. Br. at 24. But Titlow told the lower federal courts the opposite—that Chahine's testimony was "the single most damaging piece of evidence" against Titlow; that it moved "Titlow out of the mere-presence-to-smothering column and into

the aiding-and-abetting column of murder;" and that it "was the only evidence offered" on Titlow's "alleged participation in the act of smothering." Br. in Support of Pet. for Writ of Habeas Corpus 27–28, 39; Appellant's Br. on Appeal, 29, 48.

In sum, the Michigan Court of Appeals did not create a hard and fast rule in its unpublished decision; it simply (1) concluded that Titlow failed to satisfy the high burden that *Strickland* imposes on a defendant who seeks to vacate a murder conviction, and (2) recognized a Michigan attorney's ethical obligation when a client maintains innocence. Pet. Br. 31–32. So this case comes down to a critically important but remarkably simple legal principle: the burden of proof in a habeas case under AEDPA.

Applying that burden of proof, Titlow's request for habeas relief fails. Titlow has presented no admissible evidence that (1) Toca advised Titlow to withdraw the plea, (2) Toca's failure to investigate caused that phantom advice, or (3) facts that Toca would have learned during an investigation would have empowered him to change Titlow's mind. Titlow has not produced the "clear and convincing evidence" necessary to rebut the AEDPA "presumption of correctness" that attached to the Michigan Court of Appeals' fact findings, 28 U.S.C. § 2254(e)(1), nor has Titlow demonstrated how the Michigan Court of Appeals unreasonably applied this Court's "clearly established" law. 28 U.S.C. § 2254(d)(1). In other words, Titlow has identified no Michigan Court of Appeals "error well understood and comprehended in existing law[,] beyond any possibility for fairminded disagreement." *Lancaster*, 133 S. Ct. at 1786–87.

II. There is no credible, objective evidence that ineffective assistance caused Titlow to withdraw the plea and go to trial, a necessary prerequisite to a *Lafler* claim.

To demonstrate the "prejudice" prong of a *Strickland* claim in a plea context, "defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Missouri* v. *Frye*, 132 S. Ct. 1399, 1409 (2012). Most federal circuits have required a defendant to satisfy that burden with some corroborating evidence rather than simply post-trial, self-serving assertions like the one Titlow made here. Pet. Br. 41 (numerous citations); U.S. Br. 19–20 (same). At a bare minimum, the defendant's testimony "must [at least] be credible." *Merzbacher* v. *Shearin*, 706 F.3d 356, 366–67 (4th Cir. 2013).

Here, Titlow's only "proof" of prejudice was a self-serving, unsworn plea for leniency at a post-conviction sentencing hearing. Pet. Br. 42–45; U.S. Br. 21–22. As the United States explains, Titlow's statement was not under oath, provided the prosecutor no opportunity for cross-examination, lacked any indicia of reliability, and did not include a state-court credibility finding. In such circumstances, the Sixth Circuit "erred in concluding that the statement by itself was sufficient to establish prejudice." U.S. Br. 22.

Titlow has two responses; neither carries the day. Titlow first argues that the "Sixth Circuit is entirely consistent with all the other circuits in its application of the" prejudice standard. Resp. Br. 37.

But that is the exact opposite of what the Sixth Circuit has said: "Although some circuits have held that a defendant must support his own assertion that he would have accepted the [plea] offer with additional objective evidence, we in this circuit have declined to adopt such a requirement." *Smith* v. *United States*, 348 F.3d 545, 551 (6th Cir. 2003) (quoting *Griffin* v. *United States*, 330 F.3d 733, 737 (6th Cir. 2003)).

Titlow is forced to contradict the Sixth Circuit's view of its own precedent because of the feebleness of his second response—the three pieces of objective, credible "evidence" regarding Titlow's supposed willingness to accept the plea. Resp. Br. 35–37, 39–43. The Court can reject each one in summary fashion:

- First, the fact that Titlow initially accepted but later withdrew a guilty plea cuts against Titlow's position. Resp. Br. 36. Titlow withdrew the plea to maintain innocence. That reality "undermines [Titlow's] claim that the plea would have remained in place but for advice from Toca." U.S. Br. 22.

- Second, Titlow withdrew the plea despite "the strength of the State's evidence." Resp. Br. 36. Earlier in respondent's brief, Titlow argues that "the trial revealed no important facts that had not already been disclosed to the prosecution at the time of the original plea agreement." Resp. Br. 23. Those were the same facts that Titlow's first attorney discussed with Titlow at length. The only thing that changed between that discussion

and the plea withdrawal was Titlow's desire to maintain innocence. As noted above, there is not a shred of evidence that Toca advised Titlow to withdraw the plea.

- Finally, the disparity in sentencing exposure is of no relevance here. Resp. Br. 37. The situation would be different if Titlow's attorney had, as in *Lafler*, misadvised about the conviction and sentencing exposure. But here, Titlow acknowledged on the record the risk of a first-degree murder conviction. J.A. 44. And *Lafler* makes clear that a sentencing disparity is already a separate, independent requirement when proving prejudice. 132 S. Ct. at 1385 (defendant must show a reasonable probability "that the conviction or sentence, or both, under the offer's terms, would have been less severe" than the punishment ultimately faced). This Court should reject Titlow's attempt to use sentencing disparity for double duty.

Two additional factors weigh heavily against Titlow's proffered "evidence." To begin, the probative value of Titlow's statements is questionable because after a defendant has rolled the dice and lost at trial, that defendant has every incentive to recapture the benefit of a lost plea. Pet. Br. at 42; U.S. Br. 18 ("defendants can easily allege, after the fact, that they would have pleaded guilty"). Federal habeas courts should regard with great skepticism a defendant's post hoc, self-serving, post-conviction assertions regarding the acceptance of an earlier plea.

Even more telling, the prosecutor, the trial court, and Titlow's third attorney could barely persuade Titlow to plead guilty even *after* the Sixth Circuit's remand, when the whole point was to reoffer Titlow the opportunity to plead guilty. After the prosecutor re-offered the rejected plea (manslaughter conviction in exchange for Titlow's testimony at Billie's trial), Titlow placed all the blame on aunt Billie, invoked the polygraph-test results, renounced any role in killing Don, and disclaimed even the idea that Billie was trying to kill Don. Pet. Br. 45 (citing J.A. 320, 322, 323, 324). This is hardly the testimony of a defendant who would have accepted a plea but for attorney ineffectiveness.

Titlow gives scant attention to this testimony and instead accuses the State of requesting a "radically new" standard for establishing *Strickland* prejudice in the plea context, one that abolishes any consideration of subjective statements altogether. Resp. Br. 44, 46. But that has never been the State's position. Rather, the State asks simply for the common-sense approach, already adopted in five circuits, that requires some objective, credible evidence to corroborate subjective statements.

The State is also *not* asking the Court to reconsider *Lafler*. Contra Resp. Br. 43. In both *Lafler* and its companion case, *Missouri* v. *Frye*, the defendants presented objective evidence in addition to subjective statements. Pet. Br. at 42; U.S. Br. 20. "Requiring some corroborating evidence ensures that the reviewing court will apply the prejudice prong rigorously." U.S. Br. 21. This Court should adopt that sensible standard.

III. This Court needs to clarify the appropriate remedy for ineffective assistance in rejecting a plea.

In *Lafler* v. *Cooper*, this Court delineated one possible remedy with two potential outcomes where (as here) alleged ineffective assistance caused a defendant to reject a plea offer to a count less serious than the count for which defendant was convicted at trial. 132 S. Ct. at 1389. (The remedy is different where the difference between the plea and the actual sentence is the terms of years rather than the severity of the charge. See Pet. Br. 46.) The possible remedy is to "require the prosecution to reoffer the plea proposal." *Id.* And the outcome depends on how the state trial court exercises its discretion: to "[1] vacate the conviction from trial and accept the plea or [2] leave the conviction undisturbed." 132 S. Ct. at 1389. Accord Pet. Br. 46; U.S. Br. 31–32.

Importantly, the state trial court need not even require the prosecutor to reoffer the plea. The trial court can consider new, post-plea information. *Lafler*, 132 S. Ct. at 1391. The trial court can also take into account refusal to accept responsibility. *Id.* at 1389. And finally, the trial court can consider the reality that requiring the State to reoffer the terms of the plea offer is simply impossible. Here, for example, the State's offer of a less serious count and reduced sentence was contingent on Titlow's testimony against Billie Rogers. Pet. Br. 48–49; U.S. Br. 25–30. Without Titlow's testimony, a jury acquitted Billie, and Billie is now deceased. So the State will *never* have the benefit of its proffered bargain, a fact that the prosecutor emphasized when he reoffered the plea following the Sixth Circuit's decision. J.A. 319.

Titlow lacks any real response to these flaws. So instead, Titlow's overarching argument is that the Sixth Circuit properly applied *Lafler* and "did nothing more than quote [*Lafler*] itself." Resp. Br. 49–50. Not so. First, the Sixth Circuit said that the state trial court could simply "fashion" a new sentence, Pet. App. 25a, one that hews to the plea agreement as a "baseline," *id.*, rather than to Michigan's sentencing guidelines. There is no basis in *Lafler*, Michigan's statutes, or any other source of law for such a proposition in this context.

Second, the Sixth Circuit suggested that the remedy of compelling the State to reoffer the plea would be "illusory" if the state trial court could simply reinstate the post-trial sentence. Pet. App. 25a. Again, there is no precedent that reaches that conclusion, and *Lafler* itself allows a state trial court to leave the conviction and sentence from trial undisturbed. *Lafler*, 131 S. Ct. at 1389, 1391.

Titlow's other Hail Mary pass is procedural, namely, that it is premature for this Court to correct the Sixth Circuit's errors, and there is no confusion about the proper scope of a *Lafler* remedy. Resp. Br. 46–49. Titlow is wrong again.

As a threshold matter, Titlow waived any procedural objections by failing to raise them in the brief opposing Michigan's petition for certiorari. Sup. Ct. R. 15.2; *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Protection*, 130 S. Ct. 2592, 2610 (2010). It is inappropriate to assert procedural barriers at the merits stage.

More important, there is undeniably countrywide confusion about appropriate *Lafler* remedies. Consider just a few of the lower-court opinions issued in the short time since this Court decided *Lafler*:

- In a case involving a federal-court conviction, the Sixth Circuit not only ordered the prosecutor to re-offer the rejected plea agreement (or release the defendant from custody), it ordered the district court to *impose* the plea sentence to "remedy" the violation of the defendant's constitutional right. *Jones* v. *United States*, 2012 WL 5382950, at *3 (6th Cir. Nov. 5, 2012).

- In *Ebron* v. *Commissioner of Correction*, 53 A.3d 983 (Conn. Sup. Ct. 2012), the Connecticut Supreme Court said that a proper remedy might include giving the defendant "the opportunity to withdraw his original plea and to be tried." *Id.* *Lafler* does not contemplate a second trial, and such a remedy makes no sense where a defendant also already received a constitutionally adequate trial.

- And in *Johnson* v. *Uribe*, 700 F.3d 413 (9th Cir. 2012), the Ninth Circuit said that the proper remedy for a *Lafler* violation was to allow the defendant to renegotiate the case from the position he would have been in had counsel correctly calculated the lawful maximum sentence. *Johnson*, 700 F.3d at 427. Again, *Lafler* suggests no such thing. The Ninth Circuit denied rehearing en banc over a dissent by the Chief Judge and six

> other judges who described the majority's ruling as a "renegade opinion" showing "a total lack of interest" in what this Court has said about district courts' discretion in fashioning remedies. *Johnson*, 700 F.3d at 418–419.

Finally, Titlow asserts that "[r]elief correcting constitutional deprivations" is not subject to a balancing test. Resp. Br. 52. In other words, if a plea is contingent on a defendant's testimony against a co-defendant and the defendant then refuses to testify (as here), Titlow apparently believes that the Court should ignore that information when considering the appropriate remedy. But *Lafler* suggests imposing a remedy *is* a balancing of competing interests. *Lafler*, 132 S. Ct. at 1388–1389 (Sixth Amendment remedies should be tailored to the injury suffered, while not granting a windfall to the defendant or needlessly squandering the considerable resources the State has invested in the criminal prosecution). And there is nothing unconstitutional about denying a defendant a windfall.

In sum, the implications of the Sixth Circuit's faulty reading of *Lafler* reach far beyond this case. Accordingly, the State respectfully asks that this Court (1) reverse the court of appeals' AEDPA holding, (2) specify that credible, objective evidence is a necessary prerequisite to a defendant's proof that he would have accepted a plea offer but for ineffective assistance, and (3) reaffirm the remedies *Lafler* created for a defendant who proves he would have accepted a plea but for ineffective assistance.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Aaron D. Lindstrom
Assistant Solicitor General

Raina Korbakis
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

Dated: AUGUST 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEF

FILED
JUN 17 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 12-414

In the Supreme Court of the United States

SHERRY L. BURT, WARDEN, PETITIONER

v.

VONLEE NICOLE TITLOW

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ANN O'CONNELL
Assistant to the Solicitor General
APRIL A. CHRISTINE
DAVID M. LIEBERMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Library of Congress
Law Library

QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether a defendant's testimony that she would have accepted a plea offer but for her counsel's deficient advice is, standing alone, sufficient to demonstrate a reasonable probability that the defendant would have accepted the plea.

2. Whether *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), requires, as a remedy for a Sixth Amendment violation, the government to reoffer a previous plea agreement to the defendant and the sentencing court to resentence her, where the previous plea offer was conditioned upon cooperation that can no longer be provided.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 13
Argument:
I. To establish prejudice in support of an ineffective-assistance-of-counsel claim, a defendant must provide credible evidence that she would have accepted a guilty plea if properly advised 16
A. A defendant who challenges her conviction based on alleged deficient advice to reject a plea offer must establish that, with correct advice, she would have accepted the plea offer 17
B. A defendant must provide credible evidence in support of her subjective statement that she would have pleaded guilty but for her counsel's advice 18
C. Respondent has not established prejudice 21
II. The remedy for any Sixth Amendment violation in this case, including any requirement that the government must reoffer the plea agreement, should be left to the sentencing court's discretion 24
A. The government should not necessarily be required to reoffer a plea agreement that was conditioned upon cooperation from the defendant that can no longer be provided 25
B. Even if the government can properly be compelled to reoffer a prior plea agreement in these circumstances, the sentencing court may in its discretion reject the agreement and leave respondent's conviction and sentence undisturbed 31
Conclusion 32

TABLE OF AUTHORITIES

Cases: Page

Brady v. *United States*, 397 U.S. 742 (1970) 18, 18
Brookhart v. *Janis*, 384 U.S. 1 (1966).....18
Cooper v. *Lafler*, 376 Fed. Appx. 563 (6th Cir. 2010) 20, 21
Diaz v. *United States*, 930 F.2d 832 (11th Cir. 1991) 19
Florida v. *Nixon*, 543 U.S. 175 (2004) 18
Glasser v. *United States*, 315 U.S. 60 (1942) 22
Government of the V.I. v. *Scotland*, 614 F.2d 360 (3d Cir. 1980) 29
Jones v. *Barnes*, 463 U.S. 745 (1983) 18
Lafler v. *Cooper*, 132 S. Ct. 1376 (2012).....*passim*
Merzbacher v. *Shearin*, 706 F.3d 356 (4th Cir. 2013), petition for cert. pending, No. 12-9952 (filed Apr. 25, 2013) 21
Missouri v. *Frye*, 132 S. Ct. 1399 (2012).....13, 17, 20, 21, 23
Padilla v. *Kentucky*, 130 S. Ct. 1473 (2010).....17
Paters v. *United States*, 159 F.3d 1043 (7th Cir. 1998) 21
People v. *Carabell*, 161 N.W.2d 776 (Mich. Ct. App. 1968) 30
People v. *Heiler*, 262 N.W.2d 890 (Mich. Ct. App. 1977) 29
People v. *Mathis*, 285 N.W.2d 414 (Mich. Ct. App. 1979) 29
People v. *Titlow*, 738 N.W.2d 715 (Mich. 2007) 7
Premo v. *Moore*, 131 S. Ct. 733 (2011).....19
Raysor v. *United States*, 647 F.3d 491 (2d Cir. 2011) 23
Santobello v. *New York*, 404 U.S. 257 (1971) 31
Strickland v. *Washington*, 466 U.S. 668 (1984) 8, 13, 16, 18

Cases—Continued: Page

Toro v. *Fairman*, 940 F.2d 1065 (7th Cir. 1991), cert. denied, 505 U.S. 1223 (1992) 19
United States v. *Armstrong*, 517 U.S. 456 (1996) 28
United States v. *Cox*, 342 F.2d 167 (5th Cir.) cert. denied, 381 U.S. 935 (1965) 29
United States v. *Gordon*, 156 F.3d 376 (2d Cir. 1998) 19, 23
United States v. *Morrison*, 449 U.S. 361 (1981) 24
Wanatee v. *Ault*, 259 F.3d 700 (8th Cir. 2001) 17

Constitution, statutes and rules:

U.S. Const. Amend. VI ..... *passim*
28 U.S.C. 2254 ..... 1, 2, 7, 8
28 U.S.C. 2254(d) 16
28 U.S.C. 2254(d)(2) 9
28 U.S.C. 2255 1
Mich. Comp. Laws Ann. (West 2004):
§ 750.316 ..... 3, 30
§ 750.317 ..... 2, 6, 31
§ 750.321 ..... 2, 4, 31
§ 769.34(2)(b) 4, 31
Fed. R. Crim. P. 11(c)(1) 29

In the Supreme Court of the United States

No. 12-414

SHERRY L. BURT, WARDEN, PETITIONER

v.

VONLEE NICOLE TITLOW

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Although this case arises on federal habeas review of a state conviction under 28 U.S.C. 2254, it raises two issues of general significance in analyzing ineffective-assistance-of-counsel claims in the plea negotiation context: whether a convicted defendant's statement that she would have accepted a plea offer but for her counsel's deficient advice is sufficient to establish a reasonable probability that she would have accepted the plea offer, and whether a court may abuse its discretion to remedy a Sixth Amendment violation by ordering the prosecution to reoffer a previously rejected plea agreement that was conditioned upon cooperation that the defendant can no longer provide. Because the Court's analysis of those questions will likely affect federal prisoners' ineffective-assistance claims under 28 U.S.C.

2255, the United States has a substantial interest in the resolution of this case.

STATEMENT

After respondent withdrew her plea of guilty in the Circuit Court of Oakland County, Michigan, to manslaughter, in violation of Mich. Comp. Laws Ann. § 750.321 (West 2004), pursuant to a plea agreement that provided for a sentence of 7 to 15 years of imprisonment, respondent was convicted by a jury of second-degree murder, in violation of Mich. Comp. Laws Ann. § 750.317 (West 2004). Pet. App. 2a-3a.[1] The trial court sentenced respondent to 20 to 40 years of imprisonment. *Id.* at 2a. Respondent's conviction and sentence were affirmed on direct appeal. *Id.* at 98a-119a. The Michigan Supreme Court denied leave to appeal. *Id.* at 120a.

After respondent was denied state postconviction relief, she filed a petition for federal habeas corpus relief pursuant to 28 U.S.C. 2254, asserting that her former attorney had provided ineffective assistance by advising her to withdraw her guilty plea and proceed to trial. The district court denied relief. Pet. App. 34a-97a. The court of appeals reversed and conditionally granted a writ of habeas corpus, giving the State 90 days to either reoffer the original plea agreement or to release respondent. *Id.* at 1a-32a.

1. On August 12, 2000, Michigan police officers responded to a call at the home of Billie and Donald Rogers (respondent's aunt and uncle) and found Donald lying dead on the kitchen floor. Pet. App. 3a, 36a. Re-

---

[1] Respondent is a transgender person who was born as a male and identifies as a woman. Because respondent identifies herself as a woman (Br. in Opp. 1) and because the court of appeals referred to respondent using female pronouns, this brief uses female pronouns.

spondent and Billie told the officers that they had found Donald dead on the floor when they returned home from a casino. *Id.* at 3a. It was later determined that Donald had been smothered. *Id.* at 3a, 46a-47a.

On the same day Donald was killed, respondent called a friend whom she had been dating, Danny Chahine, and told Chahine about Donald's death. Pet. App. 4a, 99a. Chahine was immediately suspicious because respondent had previously talked about Billie's desire to pay for her husband's murder after Donald objected to Billie's gambling expenses, and Chahine asked respondent if she or Billie had done something to Donald. *Id.* at 4a, 40a-41a, 99a; 2:07-cv-13614 Docket entry No. (Docket entry No.) 15, at 15-16, 28-30 (E.D. Mich. Aug. 8, 2008). Respondent promised to explain everything to Chahine when they saw each other, and she later confided that she had helped kill Donald. Pet. App. 99a; J.A. 14-17. Respondent told Chahine that Donald was not dead when she and Billie returned home, that she and Billie took turns pouring vodka into Donald's mouth and nose and covering his mouth and nose, and that Billie then smothered him with a pillow. Pet. App. 4a, 42a, 53a; J.A. 6-17. Chahine reported the conversations to the police, and he later agreed to record a conversation with respondent in his car while they drove to dinner, during which he elicited further incriminating statements from her. Pet. App. 4a, 99a; J.A. 19, 22.

Billie was the sole beneficiary of Donald's estate. Shortly after Donald's death, Billie purchased new cars for herself and respondent, wrote a check to respondent for $70,260, and gave respondent gambling money. Pet. App. 4a, 48a-49a.

2. a. Respondent and Billie were charged with first-degree murder, in violation of Mich. Comp. Laws Ann.

§ 750.316 (West 2004). Pet. App. 4a-5a. Respondent, who was represented by counsel, Richard Lustig, pleaded guilty to manslaughter pursuant to a plea agreement that provided for a sentence of 7 to 15 years of imprisonment. *Id.* at 5a.[2] As a condition of the agreement, respondent was required to pass a polygraph examination confirming that Billie had smothered Donald; to testify against Billie; and not to challenge the prosecutor's recommended sentencing range on appeal. *Id.* at 5a, 99a; J.A. 300-301.

Respondent gave a statement to police and then took the polygraph examination. In the statement, respondent said that she and Billie, without a plan, poured vodka down Donald's throat, and Billie then suffocated Donald with a pillow. J.A. 38. Respondent denied killing Donald personally and denied that she planned the death. *Ibid.* The polygraph examiner concluded that respondent was being truthful when she stated that she was not lying about what happened to Donald, that she did not plan with Billie to kill him, that Billie was the one who smothered Donald with the pillow, and that she left the room when Billie smothered him. J.A. 39.

At a plea hearing held on October 29, 2001, respondent confirmed that she and Lustig had "gone over all of the evidence together over a long period of time" and had "discussed the fact that there are certain facts that could get [her] convicted of first degree murder"—namely, respondent's having received roughly $100,000 after her uncle's death to remain quiet about what had

---

[2] Under Michigan law, manslaughter is punishable by a maximum sentence of 15 years of imprisonment, Mich. Comp. Laws Ann. § 750.321 (West 2004), and the trial court may not impose a minimum sentence that exceeds two-thirds of the maximum sentence, *id.* § 769.34(2)(b).

happened, and respondent's having poured alcohol down her uncle's throat shortly before Billie smothered him. J.A. 41, 43-44, 50-51. Respondent further stated that she understood that the proposed sentencing range in the plea agreement exceeded the standard guideline range for a manslaughter conviction in Michigan. Pet. App. 5a; J.A. 51-52. The trial court accepted the plea and scheduled a sentencing hearing. Pet. App. 5a.

b. Before sentencing, respondent told a deputy sheriff at the jail where she was housed that she was innocent. Pet. App. 100a. The deputy sheriff told respondent that she should not plead guilty if she was innocent and suggested that respondent speak to another attorney. *Id.* at 5a, 100a. The deputy referred respondent to his personal attorney, who referred her to Frederick Toca. J.A. 298. Respondent discharged Lustig and hired Toca. Pet. App. 5a. Three days later, she moved to withdraw her guilty plea. *Id.* at 6a; J.A. 64.

At a hearing on November 29, 2001, the State advised the trial court that respondent was refusing to testify against Billie, whose trial was scheduled to begin that day, unless the recommended sentencing range in the plea offer was reduced to 3 to 15 years of imprisonment. Pet. App. 6a, 29a; J.A. 63-64. The prosecutor stated that the State wished to withdraw from the plea agreement "on the basis that we had an agreement that the Defendant would be testifying in the trial of Billie Rogers." J.A. 63. Toca confirmed that he had informed the prosecutor that 7 to 15 years was "out of line" and that respondent was withdrawing her plea. J.A. 64. Respondent stated that she understood the first-degree murder charge would be reinstated if she withdrew her guilty plea. J.A. 69. The court allowed respondent to withdraw her plea, and respondent refused to testify at Bil-

lie's trial. Pet. App. 6a; J.A. 69. Billie was acquitted of first-degree murder. Pet. App. 24a.

Toca later moved to withdraw as respondent's counsel because of respondent's inability to pay for a transcript of Billie's trial. Pet. App. 6a-7a, 100a. The trial court granted the motion and appointed a new attorney to represent respondent at trial. *Id.* at 6a-7a. At the trial, Chahine testified that respondent had said that, when respondent and Billie arrived home and found Donald passed out from drinking, "Billie suggested that they do what they planned on doing before" and kill Donald, which contradicted respondent's polygraph statement. J.A. 146. Chahine also testified that respondent had told him that, when Donald did not die right away, Billie upped respondent's compensation for helping from $25,000 to $50,000 and retrieved a pillow from the living room, telling respondent that she would need to help hold Donald down. J.A. 147, 177-178.

Respondent testified and maintained her innocence. She testified that she "would never hurt anybody, ever." J.A. 257. She said she did not think Billie was trying to kill Donald and she thought Billie was joking with the pillow. J.A. 259, 270. She claimed that she told Billie to leave Donald alone. J.A. 261. And she testified that she told Billie she did not want her money. J.A. 268.

A jury convicted respondent of second-degree murder, and the trial court sentenced her to 20 to 40 years of imprisonment. Pet. App. 7a.[3] At sentencing, respondent stated, "I would have testified against Billie during her trial, had I not been persuaded to withdraw

---

[3] Under Michigan law, second-degree murder is punishable "by imprisonment in the state prison for life, or any term of years, in the discretion of the [sentencing] court." Mich. Comp. Laws Ann. § 750.317 (West 2004).

my plea agreement and the chance to testify, because an attorney promised me he would represent me. * * * He told me he could take my case to trial and win. * * * He told me my previous attorney was not doing enough for me." J.A. 295; Pet. App. 8a.

c. The Michigan Court of Appeals affirmed respondent's conviction and sentence. Pet. App. 98a-119a. The court rejected respondent's argument that Toca had provided ineffective assistance of counsel. The court explained that Toca's advice that respondent should withdraw her guilty plea "was set in motion by [respondent's] statement to a sheriff's deputy that [s]he did not commit the offense." *Id.* at 101a. The court held that "[w]hen a defendant proclaims h[er] innocence, * * * it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty—no matter how 'good' the deal may appear." *Id.* at 102a. The court concluded that respondent had "failed to demonstrate that [Toca's] advice to withdraw h[er] plea fell below an objective standard of reasonableness." *Ibid.*

The Michigan Supreme Court denied leave to appeal. Pet. App. 120a.

d. Respondent filed a petition for state postconviction relief, which the state court denied. Docket entry No. 12-9, at 42 (June 20, 2008) (circuit court order); *id.* No. 34-1 (Mar. 4, 2011) (transcript of motion hearing). The Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal. *Id.* No. 12-9, at 1; *People* v. *Titlow*, 738 N.W.2d 715 (Mich. 2007).

3. Respondent filed a federal habeas corpus petition pursuant to 28 U.S.C. 2254, renewing her claim that Toca had provided ineffective assistance of counsel when he advised respondent to withdraw her guilty plea. The district court denied the petition. Pet. App. 34a-97a.

The district court concluded that the state court's finding that Toca was not ineffective was "completely reasonable on the law and the facts." *Id.* at 64a. The court explained that respondent's desire to withdraw her plea predated Toca's involvement and that defense counsel cannot be ineffective for advising a client who claims to be innocent to go to trial. *Id.* at 64a-65a. The court further stated that respondent "chose to go to trial and to take her chances with a jury" and that, although "[s]he may now regret that choice, * * * it is not a basis for granting federal-habeas relief." *Id.* at 65a.

The district court explained that the state court had applied *Strickland* v. *Washington*, 466 U.S. 668 (1984), to the facts of respondent's case and that respondent's "mere disagreement with the state court's analysis is not sufficient to warrant habeas relief." Pet. App. 64a. Applying the deferential standard for habeas relief under 28 U.S.C. 2254, the court concluded that respondent "ha[d] not shown that the Michigan Court of Appeals's decision * * * [was] contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court or an unreasonable determination of the facts." Pet. App. 62a.

The district court granted a certificate of appealability. Pet. App. 95a-96a.

4. The court of appeals reversed. Pet. App. 1a-32a.

a. The court of appeals concluded that Toca's performance was deficient under the performance prong of *Strickland*. Pet. App. 18a-21a. The court explained that the state court's conclusion that Toca had not been ineffective for advising a client who maintained her innocence to withdraw her guilty plea was "undermined" by Toca's silence about any claim of innocence at the plea withdrawal hearing and his statement that respondent

was withdrawing the plea because the recommended sentence was above the guidelines range. *Id.* at 18a-19a. The court further noted that respondent's first lawyer had submitted an affidavit stating that Toca did not retrieve respondent's case file until after the plea withdrawal hearing and that Toca "had no way to adequately advise [respondent] on * * * the reasonableness of the plea offer without first examining the evidence that the State had against her." *Id.* at 19a-20a. The court noted that "[t]he State's evidence against [respondent] was strong" and "not inconsistent with a second-degree murder conviction," and that "Toca's timely discovery of the State's evidence against [respondent] likely would have (or at least should have) led him to change his recommendation as to withdrawing the plea." *Id.* at 23a. The court concluded that the state court "unreasonably determined" that Toca had not performed deficiently "in light of the evidence presented." *Ibid.* (citing 28 U.S.C. 2254(d)(2)).

The court of appeals further concluded that respondent had suffered prejudice under the second prong of *Strickland*. Pet. App. 22a-23a. The court explained that to establish prejudice in the context of a rejected plea offer, a defendant must show that but for ineffective assistance of counsel, "there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.* at 15a (quoting *Lafler* v. *Cooper*, 132 S. Ct. 1376, 1385 (2012)). The court stated

that "unlike some circuits, this court does not require that a defendant must support his own assertion that he would have accepted the offer with additional objective evidence." *Id.* at 17a (internal quotation marks and citation omitted).

The court of appeals concluded that "the facts speak for themselves" to establish prejudice. Pet. App. 22a. The court noted that the plea agreement had been accepted by the trial court and that respondent's sentence imposed after trial was more severe than the sentence she would have received under the plea agreement. *Ibid.* The court stated that respondent's claim that she would have accepted the plea agreement but for Toca's advice was "bolstered by the fact that she had actually accepted the plea" at the earlier hearing. *Ibid.*

Turning to the issue of remedy, the court of appeals stated that "[i]n the typical case where the sole injury suffered by the defendant [is] a higher sentence, 'the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence [s]he received at trial, or something in between.'" Pet. App. 23a-24a (quoting *Lafler*, 132 S. Ct. at 1389). The court explained that respondent's case was "not such a simple case" because respondent was convicted of second-degree murder, which is a more serious charge than the manslaughter charge to which she would have pleaded under the agreement, and also because the State had lost the major benefit it sought to gain from the agreement because Billie had already been tried and acquitted without respondent's testimony. *Id.* at 24a. In such a case, the court explained, "the proper exercise of [the state court's] discretion to remedy the constitutional injury may be to require the prosecution to reoffer the

plea proposal." *Ibid.* (quoting *Lafler*, 132 S. Ct. at 1389). If respondent accepts the offer, the state court "would then have the discretion 'to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.'" *Ibid.* (quoting *Lafler*, 132 S. Ct. at 1389).

The court of appeals stated that it was "concerned that the remedy articulated in *Lafler* could become illusory if the state court chooses to merely reinstate [respondent's] current sentence." Pet. App. 24a-25a. But the court explained that "the state court's discretion is not entirely unfettered" because under *Lafler* the state court must at least consult the initial plea agreement in determining a new sentence. *Id.* at 25a. The court stated that any federal-court remedy respondent might have if the state court "imposes a sentence greater than the initial plea agreement" is "to be resolved another day." *Ibid.*

The court of appeals conditionally granted the petition for a writ of habeas corpus, "giving the State 90 days to reoffer [respondent] the original plea agreement or, failing that, to release her." Pet. App. 25a. The court further stated that if the State chooses to reoffer the plea agreement and respondent accepts it, "the state court may then exercise its discretion to fashion a sentence for [respondent] that both remedies the violation of her constitutional right * * * and takes into account any concerns that the State might have regarding the loss of [respondent's] testimony against her aunt." *Ibid.*

b. Chief Judge Batchelder dissented. Pet. App. 26a-32a. She explained that "[t]he primary error in the majority's opinion lies in its basic premise—that [respondent] chose to withdraw her plea because of Toca's advice." *Id.* at 26a. According to Chief Judge Batchelder, "[t]he record shows that [respondent] wanted to with-

draw her plea before she ever enlisted Toca as counsel," and in fact "her desire to withdraw her plea * * * was the reason she sought new counsel." *Id.* at 26a-27a.

Chief Judge Batchelder further concluded that "[e]ven if Toca was the reason [respondent] chose to withdraw her plea, the record does not establish that his performance was deficient." Pet. App. 27a. She explained that "the record, and [respondent's] own arguments throughout her appeals, support the Michigan court's conclusion because they demonstrate that [respondent] chose to obtain new counsel only after she had passed a polygraph test and [the sheriff's deputy] advised her that she should not plead guilty if she was not guilty." *Id.* at 28a. In Chief Judge Batchelder's view, Toca's different reason for respondent withdrawing her guilty plea at the hearing did not undermine the conclusion that any advice respondent may have received from Toca "was the result of [respondent's] wanting new counsel and no longer wanting to plead guilty." *Ibid.*

Chief Judge Batchelder further concluded that even if Toca had not examined respondent's case file before moving to withdraw her guilty plea, "nothing in the record establish[es] that the case file would have undermined any advice that Toca may have given [respondent]." Pet. App. 29a. She noted that respondent had signed a fee agreement with Toca on November 26, 2001, and that the hearing on the motion to withdraw respondent's guilty plea was conducted three days later, on the day Billie's trial was scheduled to begin. *Ibid.* Accordingly, "[i]f [respondent] wanted to withdraw her plea, as the record suggests, then she needed to make a decision before she had to testify in [Billie's] trial," and Toca's decision to move quickly to withdraw the plea was reasonable. *Ibid.*

Chief Judge Batchelder also disagreed with the majority's description of *Lafler*'s requirements for the state trial court on remand. Pet. App. 31a. She explained that "*Lafler* does not, as the majority states, *require* the trial court to consult the plea agreement; it simply says that the 'baseline' of the original plea offer 'can be consulted in finding a remedy.'" *Ibid.* (quoting *Lafler*, 132 S. Ct. at 1389). She further explained that *Lafler* does not require the state trial court to resentence respondent. Instead, "once the prosecution reoffers the plea proposal, 'the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.'" *Ibid.* (quoting *Lafler*, 132 S. Ct. at 1389). Chief Judge Batchelder explained that it is not the state court's responsibility to fashion a sentence for respondent that remedies the violation of her constitutional right. Instead, "the remedy for the violation is the government's reoffering of the original plea agreement." *Id.* at 31a-32a.

SUMMARY OF ARGUMENT

I. To establish prejudice under the second prong of *Strickland* v. *Washington*, 466 U.S. 668, 688 (1984), a defendant asserting that she would have accepted a guilty plea but for deficient advice from counsel "must demonstrate a reasonable probability [she] would have accepted the earlier plea offer had [she] been afforded effective assistance of counsel." *Missouri* v. *Frye*, 132 S. Ct. 1399, 1409 (2012). The prejudice requirement is founded on the principle that only attorney errors that affect the outcome of the adversarial process should be grounds for relief.

That concern is acute in challenges based on alleged misadvice to reject or withdraw a guilty plea. When a

defendant who has rejected a plea offer is convicted by a jury, she will have every incentive to try and regain the benefits of the rejected plea. Courts have therefore required defendants who claim that they would have accepted a guilty plea but for counsel's deficient advice to provide some corroborating evidence of any self-serving post-trial statement to that effect. And if a court is going to rely on a defendant's subjective statement that the defendant would have pleaded guilty, that statement must at least be credible.

Assuming that Toca gave respondent deficient advice about whether to withdraw her guilty plea, respondent has failed to demonstrate a reasonable probability that she would not have withdrawn her guilty plea but for that advice. Her statement to that effect at her sentencing hearing was unsworn and had no marks of reliability. And the fact that respondent previously pleaded guilty does not corroborate her claim that the plea would have remained in place had she not received deficient advice. The objective evidence in the record shows that after entering the plea, respondent decided to maintain her innocence, sought new counsel because of that claim, and withdrew the plea with a full understanding of the consequences of that decision.

II. Even assuming that respondent's Sixth Amendment rights were violated by counsel's advice to withdraw her guilty plea, the court of appeals improperly interfered with the sentencing court's discretion to formulate a remedy. The Court stated in *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), that the boundaries of a sentencing court's discretion to remedy a Sixth Amendment violation in the context of a rejected plea offer would be defined over time, and the Court did not hold that the government is always required to reoffer a prior plea

agreement as part of a remedy for any Sixth Amendment violation.

The plea agreement in this case was conditioned on respondent testifying against her aunt at trial. Respondent's plea withdrawal meant that the State went to trial against her aunt without respondent's testimony, and her aunt was acquitted. Respondent's promise to testify, therefore, can no longer be fulfilled. As a result, serious fairness and separation-of-powers issues flow from the order requiring the State to reoffer the agreement. There was also significant evidence that came to light after the plea offer about respondent's role in the murder. If the boundaries of a district court's discretion to formulate a remedy for a Sixth Amendment violation in this context are to be developed over time, then a federal post-conviction court should not categorically order the government to reoffer the plea agreement in circumstances that are different from those in *Lafler*. That decision should be left to the sentencing court, and the remedy that court imposes would be subject to review for abuse of discretion.

Finally, to the extent the court of appeals suggested that the sentencing court must accept the plea agreement or that it necessarily had to resentence respondent, it did not fully convey the range of the sentencing court's discretion. The sentencing court would have compelling reasons to reject any reoffered plea agreement on the facts presented here, and *Lafler* specifically leaves open the possibility that a sentencing court could, in its discretion, leave both the conviction and sentence from trial undisturbed.

ARGUMENT

I. TO ESTABLISH PREJUDICE IN SUPPORT OF AN INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIM, A DEFENDANT MUST PROVIDE CREDIBLE EVIDENCE THAT SHE WOULD HAVE ACCEPTED A GUILTY PLEA IF PROPERLY ADVISED

A defendant making a claim of ineffective assistance of counsel must show both: (1) that counsel's performance "fell below an objective standard of reasonableness," and (2) that the deficient performance prejudiced the defendant. *Strickland* v. *Washington*, 466 U.S. 668, 688 (1984). To show prejudice in the context of a rejected plea offer, a defendant's unsworn, after-the-fact statement that she would have accepted the plea offer if she had been properly advised, standing alone, is insufficient to establish prejudice.[4]

---

[4] The first question presented in the petition for a writ of certiorari is "[w]hether the [court of appeals] failed to give appropriate deference to a Michigan state court under [28 U.S.C. 2254(d)] in holding that defense counsel was constitutionally ineffective for allowing [r]espondent to maintain [her] claim of innocence." Pet. Br. i. Because the deferential standard set forth in Section 2254(d) applies only to federal habeas review of state convictions, the United States has not briefed that question. The United States agrees with petitioner, however, that respondent failed to establish any state-court record on what advice Toca gave her about her guilty plea. Without such evidence in the record, it is difficult to infer that Toca's advice caused respondent to withdraw her guilty plea. Nevertheless, the government assumes for the purpose of evaluating *Strickland*'s prejudice prong that counsel performed deficiently by overestimating respondent's chance of being acquitted at trial. See J.A. 295 ("He told me he could take my case to trial and win. * * * He told me my previous attorney was not doing enough for me.").

A. A Defendant Who Challenges Her Conviction Based On Alleged Deficient Advice To Reject A Plea Offer Must Establish That, With Correct Advice, She Would Have Accepted The Plea Offer

To demonstrate prejudice in the context of a rejected or withdrawn guilty plea, "defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Missouri* v. *Frye*, 132 S. Ct. 1399, 1409 (2012); see also *Lafler* v. *Cooper*, 132 S. Ct. 1376, 1385 (2012).[5]

Where a defendant alleges that she would have *rejected* a guilty plea absent deficient advice, she must convince the court that "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1485 (2010). When a defendant alleges that she would have *accepted* a guilty plea absent deficient advice, courts have required not only that such a decision be rational, but also that the particular defendant would have accepted the plea. See, *e.g.*, *Wanatee* v. *Ault*, 259 F.3d 700, 704 (8th Cir. 2001) ("[T]he inquiry into [whether the defendant] would have [accepted the plea] under different circumstances is necessarily subjective."); *Frye*, 132

---

[5] "Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it," and they must show that "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Frye*, 132 S. Ct. at 1409; see *Lafler*, 132 S. Ct. at 1385. Those additional requirements are satisfied here. The plea had previously been entered and accepted by the court, and respondent was convicted of a more severe charge at trial and sentenced to a prison term that exceeds the maximum punishment for manslaughter.

S. Ct. at 1410-1411 (discussing record evidence to determine whether Frye would have accepted a plea offer had he known about it).

The subjective component is necessary in these circumstances because the decision whether to plead guilty is personal to the defendant, who alone has the "ultimate authority" to decide to enter a plea. *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004) (citation omitted); *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Brady* v. *United States*, 397 U.S. 742, 748 (1970) (decision must be an "expression of [the defendant's] own choice)"). An attorney must therefore respect a client's personal desire to reject a plea offer and take a case to trial, even where that course is not advisable. *Brookhart* v. *Janis*, 384 U.S. 1, 7-8 (1966); *Nixon*, 543 U.S. at 187.

B. A Defendant Must Provide Credible Evidence In Support Of Her Subjective Statement That She Would Have Pleaded Guilty But For Her Counsel's Advice

1. The prejudice inquiry is founded on the principle that only attorney errors that affect the outcome of the adversarial process should be grounds for relief. *Strickland*, 466 U.S. at 691. That concern is significant in challenges based on alleged misadvice to reject or withdraw a guilty plea. When convicted after a jury trial, defendants will have every incentive to attempt to revert to a rejected plea offer that would have provided for less prison time. These defendants can easily allege, after the fact, that they would have pleaded guilty had they been given competent advice. If every such credited allegation established prejudice, the prejudice inquiry would fail to filter out cases in which counsel's deficiency did not actually affect the outcome of the proceeding. Cf. *id.* at 697 (ineffective assistance claim can be re-

solved by finding lack of prejudice without reaching adequacy of performance).

In hindsight, it is all too easy to exaggerate the impact of counsel's advice on the defendant's decision to reject a plea offer. See *Premo* v. *Moore*, 131 S. Ct. 733, 741 (2011) (cautioning against "the potential for the distortions and imbalance that can inhere in a hindsight perspective"). It is also tempting for a reviewing court, seeing the results of the trial, to accept a defendant's post hoc assertion that counsel's advice caused her to reject an advantageous plea offer.

2. Recognizing this reality, courts have required defendants who claim that they rejected a guilty plea because of deficient advice to provide some corroborating evidence of any post-trial claim that they would have pleaded guilty but for counsel's advice. See *Toro* v. *Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991) (defendant "must establish through objective evidence that there is a reasonable probability that, but for counsel's advice, he would have accepted the plea" and defendant's self-serving statement that he "would have * * * been insane" to reject a guilty plea if properly advised was by itself insufficient to establish prejudice), cert. denied, 505 U.S. 1223 (1992); *Diaz* v. *United States*, 930 F.2d 832, 835 (11th Cir. 1991) ("Given [defendant's] awareness of the plea offer, his after the fact testimony concerning his desire to plead, without more, is insufficient to establish that but for counsel's alleged advice or inaction, he would have accepted the plea offer."); *United States* v. *Gordon*, 156 F.3d 376, 380-381 (2d Cir. 1998) (per curiam) (stating that a "defendant's self-serving, post-conviction testimony regarding * * * intent with respect to a plea offer" was insufficient by itself to establish prejudice, but where counsel's deficient perfor-

mance was to grossly misadvise his client on sentencing exposure, "a great disparity between the actual maximum sentencing exposure under the Sentencing Guidelines and the sentencing exposure represented by defendant's attorney" was "sufficient objective evidence" to establish prejudice).

The Court's disposition of *Frye* is consistent with that approach. In *Frye*, the Court did not rely on evidence that "Frye testified he would have entered a guilty plea to the misdemeanor had he known about the offer" to conclude that there was a reasonable probability that Frye would have accepted the plea absent his attorney's deficient performance. 132 S. Ct. at 1405. Instead, the Court evaluated the objective evidence in the record and reached that conclusion based on Frye's later decision to enter an open plea to a longer sentence, along with the absence of any "revelations between plea offers about the strength of the prosecution's case" that would have made a late decision to plead guilty "insufficient to demonstrate, without further evidence, that the defendant would have pleaded guilty to an earlier, more generous plea offer if his counsel had reported it to him." *Id.* at 1410-1411.[6]

---

[6] *Lafler* is also consistent with a rule that requires corroboration of a defendant's subjective statement that he would have accepted a plea. The Court in *Lafler* summarily adopted the court of appeals' prejudice analysis. See 132 S. Ct. at 1391. The court of appeals did mention Lafler's after-the-fact statement that he would have accepted a plea offer but for his attorney's deficient advice. *Cooper* v. *Lafler*, 376 Fed. Appx. 563, 571 (6th Cir. 2010). But the court of appeals also catalogued other evidence of Lafler's intent—testimony by counsel at a post-conviction hearing that Lafler had initially desired to plead guilty, and a letter sent by Lafler to the trial judge asking if he could plead guilty to a lesser offense. *Id.* at 566, 572.

Requiring some corroborating evidence ensures that the reviewing court will apply the prejudice prong rigorously. The court may consult the trial record and any indicia that the defendant desired to plead guilty. See, *e.g.*, *Frye*, 132 S. Ct. at 1409-1410 (highlighting defendant's decision to enter open plea). The court may consider testimony from the defendant and the attorney about their conversations. See, *e.g.*, *Cooper* v. *Lafler*, 376 Fed. Appx. 563, 567 (6th Cir. 2010) (recounting defendant and attorney's testimony in state post-conviction hearing). Other witnesses who spoke with the defendant may also have relevant information. See, *e.g.*, *Paters* v. *United States*, 159 F.3d 1043, 1047 (7th Cir. 1998) (considering affidavits from defendant's parents). And a court may examine any contemporaneous notes, letters, or correspondence about the plea. *Lafler*, 376 Fed. Appx. at 566 (defendant sent a pro se letter proposing a plea). Finally, if a court is going to rely on a defendant's subjective statement that she would have pleaded guilty, it "must [at least] be credible." *Merzbacher* v. *Shearin*, 706 F.3d 356, 366-367 (4th Cir. 2013), petition for cert. pending, No. 12-9952 (filed Apr. 25, 2013).

C. Respondent Has Not Established Prejudice

Even assuming that Toca performed deficiently by overestimating respondent's chances for success at trial, see note 4, *supra*, respondent has failed to establish a reasonable probability that she would not have withdrawn her plea but for that advice. The court of appeals relied on respondent's statement during her sentencing hearing that, "I would have testified against Billie during her trial, had I not been persuaded to withdraw my plea agreement and the chance to testify." J.A. 295. That self-serving testimony cannot by itself support a

finding of prejudice. The statement was made as part of an unsworn plea for leniency during a sentencing hearing, after respondent had been convicted of second-degree murder by a jury. The statement lacked any indicia of reliability; it was not made under oath, the prosecutor had no opportunity to cross-examine it, and the state trial court made no credibility finding. "It is not for [appellate courts] * * * to determine the credibility of witnesses," see *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), and the court of appeals erred in concluding that the statement by itself was sufficient to establish prejudice.

The court of appeals stated that the statement was "bolstered by the fact that [respondent] had actually accepted the plea" at an earlier plea hearing. Pet. App. 22a. But respondent's previous acceptance of the plea offer works against her. After stating during her plea hearing that she understood that there was evidence on which a jury could convict her of first-degree murder and sentence her to life imprisonment, J.A. 43-44, 50-51, respondent expressed dissatisfaction with her plea by telling a prison guard that she was innocent, she sought out new counsel, and she moved to withdraw her plea. That course of action, together with respondent's continued claims of innocence throughout her trial, undermines her claim that the plea would have remained in place but for advice from Toca.

To the extent respondent relies on Toca's statements in the plea withdrawal hearing that respondent was withdrawing the plea because the sentence was too high without mentioning her innocence, that fact may show that Toca took an aggressive position in renegotiating the plea, but it does not show that the plea would have otherwise remained in place. The objective evidence in

the record—respondent's averments of innocence to a prison guard, her affirmative efforts to get out of her plea, and her continued assertion of innocence during her trial—refutes her current claim that there is a reasonable probability that, absent counsel's allegedly deficient advice, respondent would have left the plea in place.

Finally, respondent cannot rely on a disparity between the sentence recommended in her plea agreement and the sentence she received after trial as objective evidence supporting her assertion that she would have accepted the plea offer but for counsel's deficient advice.[7] Although a significant sentencing disparity may support such an inference in a case where counsel's deficient performance was to misadvise the defendant about her sentencing exposure or not to relay a plea offer at all, see *Gordon*, 156 F.3d at 380, it cannot support such an inference where, as here, the defendant was aware of the plea offer and fully understood that she could be convicted of first-degree murder and sentenced to life imprisonment if she was convicted after a trial. *Lafler* and *Frye* already require a defendant to show that "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time" to establish prejudice. *Frye*, 132 S. Ct. at 1409; *Lafler*, 132 S. Ct. at 1385. In the circumstances presented here, that sentencing disparity does not further serve to corroborate

---

[7] But see *Raysor* v. *United States*, 647 F.3d 491, 496 (2d Cir. 2011) (disparity between the sentence offered in the plea agreement and sentence imposed after trial, "[a]long with appellant's testimony, * * * may provide enough 'objective evidence' to support the inference appellant would have accepted the plea offer if properly advised").

respondent's subjective assertion that she would have accepted the plea offer but for counsel's deficient performance.

II. THE REMEDY FOR ANY SIXTH AMENDMENT VIOLATION IN THIS CASE, INCLUDING ANY REQUIREMENT THAT THE GOVERNMENT MUST REOFFER THE PLEA AGREEMENT, SHOULD BE LEFT TO THE SENTENCING COURT'S DISCRETION

Assuming *arguendo* that respondent's Sixth Amendment rights were violated by counsel's advice to withdraw her guilty plea and proceed to trial, the court of appeals' articulation of the proper remedy requires correction by this Court. In *Lafler*, the Court explained that Sixth Amendment remedies "should be 'tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'" 132 S. Ct. at 1388 (quoting *United States* v. *Morrison*, 449 U.S. 361, 364 (1981)). A remedy should "neutralize the taint of a constitutional violation" but at the same time it should "not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." *Id.* at 1388-1389 (internal quotation marks and citation omitted).

In this case, the court of appeals ordered the State to reoffer the previous plea agreement to respondent or else release her within 90 days, and it further stated that if respondent accepts the agreement, "the state court may then exercise its discretion to fashion a sentence * * * that both remedies the violation of [respondent's] constitutional right * * * and takes into account any concerns that the State might have regarding the loss of [respondent's] testimony against her aunt." Pet. App. 25a. The court expressed its concern

that reinstatement of respondent's second-degree murder sentence would make the *Lafler* remedy "illusory" and that further federal-court review loomed if the state court "imposes a sentence greater than the initial plea agreement." *Id.* at 24a-25a.

In the circumstances presented here, where the plea agreement is premised not only on the government's avoidance of a trial but also on cooperation from the defendant that can no longer be provided, the court of appeals should not have ordered the State to reoffer the plea agreement. That decision should have been left to the sentencing court, and the remedy devised by that court would be subject to review for abuse of discretion. Furthermore, to the extent the court of appeals' decision requires the state court to resentence respondent, the Court should make clear that the trial court may in its discretion leave the conviction and sentence imposed at the conclusion of respondent's trial undisturbed.

A. The Government Should Not Necessarily Be Required To Reoffer A Plea Agreement That Was Conditioned Upon Cooperation From The Defendant That Can No Longer Be Provided

1. In *Lafler*, the Court explained that in circumstances where the defendant is convicted after a jury trial of the same offense to which she would have pleaded guilty under a plea agreement, the only advantage the defendant would have gained under the plea agreement absent ineffective assistance of counsel is a lesser sentence. 132 S. Ct. at 1389. In those circumstances, the sentencing court on remand "may exercise [its] discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence [s]he received at trial, or something in between." *Ibid.*

That course, however, becomes more complicated in other factual scenarios. For example, if a defendant is convicted of a more serious charge than the charge offered in the plea agreement, or if a mandatory sentence for the charge on which the defendant is convicted would eliminate the sentencing court's discretion to impose the sentence offered in the plea agreement, then resentencing based on the conviction at trial "may not suffice." *Lafler*, 132 S. Ct. at 1389. The Court stated that in those circumstances, "the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal." *Ibid.* Once that occurs, "the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." *Ibid.*

The Court did not hold in *Lafler* that the government must always reoffer the previous plea agreement whenever the defendant is convicted of a more serious charge after a trial. The Court stated that this course "*may be*" "the proper exercise of discretion to remedy [a Sixth Amendment] injury" in certain circumstances, 132 S. Ct. at 1389 (emphasis added), and the Court concluded that ordering the State to reoffer the plea agreement was "[t]he correct remedy in [the] circumstances" presented in that case, where the previous plea offer required the defendant to do nothing more than to plead guilty. *Id.* at 1391; *id.* at 1383 (prosecution offered to dismiss two charges and recommend a sentence of 51 to 85 months "in exchange for a guilty plea"). But the Court made clear in *Lafler* that "the boundaries of [the sentencing court's] discretion" would be defined over time, *id.* at 1389, and Justice Alito suggested that requiring the prosecution to renew an old plea offer "would represent

an abuse of discretion in at least [some] circumstances"—for example, "when important new information * * * comes to light after the offer is rejected" and when "rejection of the plea offer results in a substantial expenditure of scarce prosecutorial or judicial resources." *Id.* at 1399 (Alito, J., dissenting).

2. If the boundaries of a sentencing court's discretion in fashioning a remedy for a Sixth Amendment violation are to be defined over time, then a federal post-conviction court should not categorically order the government to reoffer a plea agreement in situations that are different from those in *Lafler*. That decision should be left for the sentencing court, and the remedy that court imposes would be subject to review for abuse of discretion.

Unlike in *Lafler*, where the plea agreement required the defendant to do nothing more than to plead guilty, the State's plea offer in this case was conditioned upon respondent—an eyewitness to her uncle's murder—testifying against her aunt at trial. Pet. App. 5a, 99a. Respondent refused to do so, and without respondent's testimony, a jury acquitted her aunt. *Id.* at 24a. The State is thus being compelled to offer an agreement that it did not previously make, under which respondent—who was charged with first-degree murder—is offered an opportunity to plead guilty to manslaughter with a recommended sentence of 7 to 15 years of imprisonment, in exchange for nothing. Without respondent's agreement to testify, the State may not have offered her a plea agreement at all, or it may have only negotiated down to the second-degree murder charge of which respondent was ultimately convicted. Indeed, when respondent indicated that she was unwilling to testify against her aunt, the prosecutor stated that the State

"wishe[d] to withdraw from any kind of agreement that was reached with this witness, on the basis that we had an agreement that [respondent] would be testifying in the trial of Billie Rogers." J.A. 63. Requiring the government to reoffer the terms of a plea agreement in these circumstances creates serious problems, both legal and practical.

First, requiring the State to offer respondent a manslaughter plea is unfairly one-sided and contrary to the purpose of plea bargaining. As this Court has explained, the essence of plea-bargaining is "mutuality of advantage." *Brady*, 397 U.S. at 752. Requiring the State to reoffer the terms of a prior plea agreement that was conditioned upon cooperation the defendant subsequently refused to provide upsets that mutuality. After Billie was acquitted in a trial where respondent refused to testify, the benefit to the State under the agreement was gone. Respondent, on the other hand, gets an undeserved windfall—both a trial at which she had the chance to win an acquittal, and the benefits of a plea agreement that she never would have been offered without her agreement to testify.

Second, requiring the State to reoffer a plea agreement in these circumstances contravenes separation-of-powers principles.[8] In the federal system, the Executive Branch "retain[s] 'broad discretion' to enforce the Nation's criminal laws." *United States* v. *Armstrong*, 517

---

[8] Although a federal court reviewing a state conviction on habeas may not be bound by state separation-of-powers principles, it would be unusual for a federal court in enforcing the Sixth Amendment (which, in pertinent part, applies identically to federal and state governments) to order a remedy against a state government that would contravene the *federal* separation of powers if employed against the United States.

U.S. 456, 464 (1996) (citation omitted); *United States* v. *Cox*, 342 F.2d 167, 171-172 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965); *id.* at 190-193 (Wisdom, J., concurring specially). Like the decisions whether to prosecute and what charges to bring, the decisions whether to engage in plea bargaining and the sort of deal to offer belong solely to the Executive. Although a trial court has authority to reject certain types of plea agreements, it cannot compel the prosecutor to plea-bargain nor dictate the terms of any deal. See, *e.g.*, *Government of the V.I.* v. *Scotland*, 614 F.2d 360, 364-365 (3d Cir. 1980); accord, *e.g.*, *People* v. *Heiler*, 262 N.W.2d 890, 895 (Mich. Ct. App. 1977) (same, under Michigan's "constitutional separation of powers") (citation omitted). Both federal and Michigan judges are barred from any role in plea negotiations. See Fed. R. Crim. P. 11(c)(1); *People* v. *Mathis*, 285 N.W.2d 414, 416 (Mich. Ct. App. 1979).

Requiring the State to reoffer the terms of its previous plea offer in the circumstances presented here violates those principles because it requires the prosecution to make a plea offer that it never previously made. That requirement "interfere[s] with [the prosecutor's] discretionary functions, *i.e.*, determining what he feels is fairest in light of the defendant's circumstances, the government's resources, and the statute involved." *Scotland*, 614 F.2d at 364. The court of appeals should have allowed the state court to determine whether requiring the State to reoffer the plea agreement is warranted on these facts, and any such requirement would be subject to review for abuse of discretion.

Furthermore, significant new evidence "[came] to light after the offer [was] rejected," *Lafler*, 132 S. Ct. at 1399 (Alito, J., dissenting), which further supports the

conclusion that requiring the State to reoffer the terms of its previous plea offer may be an inappropriate remedy in this case. See also *id.* at 1389 (stating that the sentencing court does not necessarily need to ignore "any information concerning the crime that was discovered after the plea offer was made"). Chahine testified at trial that respondent told him that she and Billie had previously formed a plan to kill Donald, contradicting respondent's polygraph testimony, and that Billie increased the amount of money she was willing to pay respondent if respondent would hold Donald down while Billie smothered him. J.A. 146-147, 177-178. Those facts are not only consistent with a second-degree murder conviction, as the court of appeals acknowledged (Pet. App. 23a), they are consistent with first-degree murder. See Mich. Comp. Laws Ann. § 750.316(1)(a) (West 2004) (first-degree murder is murder perpetrated by means of any "willful, deliberate, and premeditated killing").

Moreover, respondent's testimony at trial that she misunderstood what was happening and thought Billie was "joking" with the pillow, that she told Billie to leave Donald alone, and that she was in a different room when Billie smothered Donald, J.A. 259, 261, 270, 277, may be inconsistent with a guilty plea. See *People* v. *Carabell*, 161 N.W.2d 776, 779 (Mich. Ct. App. 1968) (manslaughter is the "unlawful killing of another without malice") (citation omitted). The sentencing court should have been afforded an opportunity to consider this additional evidence in determining whether it was appropriate to require the State to reoffer the terms of the previous plea agreement as part of a Sixth Amendment remedy in this case.

B. Even If The Government Can Properly Be Compelled To Reoffer A Prior Plea Agreement In These Circumstances, The Sentencing Court May In Its Discretion Reject The Agreement And Leave Respondent's Conviction And Sentence Undisturbed

Even if the court of appeals did not err in requiring the State to reoffer the plea agreement, the court of appeals was wrong to the extent it suggested that the sentencing court must accept the plea agreement or that it necessarily had to resentence respondent.

The state court would be firmly within its discretion to reject any reoffered plea agreement in this case. See *Santobello* v. *New York*, 404 U.S. 257, 262 (1971); *Lafler*, 132 S. Ct. at 1389 (sentencing court may "accept the plea or leave the conviction undisturbed"). The maximum penalty for manslaughter under Michigan law is 10 to 15 years of imprisonment. See Mich. Comp. Laws Ann. § 750.321 (West 2004) (maximum sentence for manslaughter conviction is 15 years); *id.* § 769.34(2)(b) (trial court may not impose a minimum sentence that exceeds two-thirds of the maximum sentence). That is only slightly more severe than the 7 to 15-year sentence offered in the plea agreement. If the state court accepted a reoffered plea agreement, it would thus have very little room to account for the very significant "competing interests" at stake, *Lafler*, 132 S. Ct. at 1388 (citation omitted)—*i.e.*, the State's loss of respondent's eyewitness testimony and the resources it invested in respondent's trial—and this remedy would thus result in a "windfall" to respondent, *id.* at 1388-1389. On the other hand, the state court may impose "any term of years" for a second-degree murder conviction. See Mich. Comp. Laws Ann. § 750.317 (West 2004). It would thus make far more sense in these circumstances for the

state court to leave respondent's second-degree murder conviction in place.

Furthermore, although the state court could, in its discretion, resentence respondent to a shorter term of imprisonment than it imposed at the conclusion of her trial, the Court specifically stated in *Lafler* that it is within the trial court's discretion to "leave the * * * sentence from trial undisturbed." 132 S. Ct. 1391. The court of appeals' insinuation that the state court must necessarily resentence respondent was therefore unwarranted.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ANN O'CONNELL
Assistant to the Solicitor General
APRIL A. CHRISTINE
DAVID M. LIEBERMAN
Attorneys

JUNE 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JUL 24 2013
OFFICE OF THE CLERK

No. 12-414

In the Supreme Court of the United States

SHERRY L. BURT, WARDEN
Petitioner,
v.
VONLEE NICOLE TITLOW,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, SUPPORTING RESPONDENT

NANCY HOPPOCK
CENTER ON THE
ADMINISTRATION OF
CRIMINAL LAW
139 MacDougal Street
3rd Floor
New York, NY 10012
(212) 998-6612

DANIEL MERON
Counsel of Record
LORI ALVINO MCGILL
STEPHANIE N. GRACE
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
Daniel.Meron@lw.com
(202) 637-2218

Counsel for Amicus Curiae

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE STATE'S POSITION IS FORECLOSED BY THIS COURT'S PRECEDENT 4

II. THE STATE'S POSITION IS CONTRADICTED BY CIRCUIT COURT PRECEDENT AS WELL 6

A. There Is No Meaningful Circuit Split Because Every Circuit In Practice Employs A "Totality Of The Circumstances" Test 6

B. Even The Isolated Cases That Have Used The "Objective Evidence" Terminology Have Construed It So Broadly As To Render It Meaningless And Confusing 12

III. ADOPTING THE STATE'S POSITION WOULD LEAD TO UNJUST RESULTS 16

TABLE OF CONTENTS—Continued

Page

IV. PRESERVING TRIAL COURTS' DISCRETION TO FIND PREJUDICE UNDER *STRICKLAND* WILL NOT RESULT IN A FLOOD OF FRIVOLOUS CLAIMS 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

Alvernaz v. Ratelle,
831 F. Supp. 790 (S.D. Cal. 1993) 13, 14, 15, 22

Bachicha v. Shanks,
66 F.3d 338 (10th Cir. 1995), *reported in full at*
1995 WL 539467 (10th Cir. Aug. 31, 1995).....10

Beckham v. Wainwright,
639 F.2d 262 (5th Cir. 1981) 17

Broadwater v. United States,
Nos. 204CV307+, 2005 WL 1712261
(N.D. Ind. July 21, 2005).....15

Carmichael v. Colorado,
206 P.3d 800 (Colo. 2009) 14

Diaz v. United States,
930 F.2d 832 (11th Cir. 1991) 9

Griffin v. United States,
330 F.3d 733 (6th Cir. 2003) 22

Hankerson v. North Carolina,
432 U.S. 233 (1977) 20

Henderson v. United States,
133 S. Ct. 1121 (2013) 20

Hoffman v. Arave,
455 F.3d 926 (9th Cir. 2006) 13, 20

TABLE OF AUTHORITIES—Continued

Page(s)

Illinois v. Curry,
687 N.E.2d 877 (Ill. 1997) 13

In re Alvernaz,
830 P.2d 747 (Cal. 1992) 13

Julian v. Bartley,
495 F.3d 487 (7th Cir. 2007) 8, 9, 14

Kennedy v. Louisiana,
554 U.S. 407 (2008) 20

Kyles v. Whitley,
514 U.S. 419 (1995) 5

Lafler v. Cooper,
132 S. Ct. 1376 (2012) 2, 13, 21

Lewandowski v. Makel,
949 F.2d 884 (6th Cir. 1990) 14

Maldonado v. Archuleta,
61 F. App'x 524 (10th Cir. 2003) 10

Mask v. McGinnis,
233 F.3d 132 (2d Cir. 2000) 7, 14, 15

McFarland v. Scott,
512 U.S. 1256 (1994) 20

Merzbacher v. Shearin,
706 F.3d 356 (4th Cir. 2013) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Missouri v. Frye,
132 S. Ct. 1399 (2012) 2

Moses v. United States,
175 F.3d 1025 (8th Cir. 1999) 9

Nix v. Whiteside,
475 U.S. 157 (1986) 5

Nunes v. Mueller,
350 F.3d 1045 (9th Cir. 2003) 11

Ostrander v. Green,
46 F.3d 347 (4th Cir. 1995) 14

Paters v. United States,
159 F.3d 1043 (7th Cir. 1998) 8, 13, 15

Pennsylvania v. Napper,
385 A.2d 521 (Pa. Super. Ct. 1978) 16, 17

Purdy v. Zeldes,
337 F.3d 253 (2d Cir. 2003) 8

Raysor v. United States,
647 F.3d 491 (2d Cir. 2011) 7

Roper v. Simmons,
543 U.S. 551 (2005) 20

Sanders v. United States,
341 F.3d 720 (8th Cir. 2003) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Slevin v. United States,
71 F. Supp. 2d 348 (S.D.N.Y. 1999).....15

Soto-Lopez v. Unites States,
Nos. 07cr3475+, 2011 WL 176026
(S.D. Cal. Jan. 19, 2011).....18

Strickland v. Washington,
466 U.S. 668 (1984).....2, 5

Teague v. Scott,
60 F.3d 1167 (5th Cir. 1995).....11, 20

Toro v. Fairman,
940 F.2d 1065 (7th Cir. 1991).....8, 12

Tse v. United States,
290 F.3d 462 (1st Cir. 2002).....11

Turner v. Tennessee,
858 F.2d 1201 (1988).....13

United States v. Day,
969 F.2d 39 (3d Cir. 1992).....11, 13, 22

United States v. Gordon,
156 F.3d 376 (2d Cir. 1998).....6, 7

United States v. Hernandez,
450 F. Supp. 2d 950 (N.D. Iowa 2006).....14

United States v. Luke,
686 F.3d 600 (8th Cir. 2012).....10

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Morris,
106 F. App'x 656 (10th Cir. 2004) 10

United States v. Soto-Lopez,
475 F. App'x 144 (9th Cir. 2012) 17, 18, 19

Wanatee v. Ault,
101 F. Supp. 2d 1189 (N.D. Iowa 2000) 14

Whitmore v. Arkansas,
495 U.S. 149 (1990) 21

Williams v. Maryland,
605 A.2d 103 (Md. Ct. App. 1992) 13

Wolford v. United States,
722 F. Supp. 2d 664 (E.D. Va. 2010) 13

STATUTES AND RULES

28 U.S.C. § 2254(d)(2) 23

S. Ct. R. 37 1

INTEREST OF AMICUS CURIAE

The Center on the Administration of Criminal Law (the "Center") is an organization dedicated to developing and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formulation of public policy. The Center's litigation component aims to use its empirical research and experience with criminal justice practices to assist in important criminal justice cases in state and federal courts throughout the United States.

The Center is well-suited to aid this Court's decision by describing what evidence courts have actually required in order to find prejudice in instances where a defendant has received ineffective assistance of counsel during the plea bargaining process. In addition to surveying how courts have traditionally made prejudice determinations in this context, this brief also evaluates the constitutional and practical concerns that would arise if the "objective evidence" test for prejudice proposed by Petitioner State of Michigan ("State") were adopted by this Court.[1]

SUMMARY OF ARGUMENT

Just two Terms ago, this Court recognized a fundamental Sixth Amendment right to counsel during

---

[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* represents that this brief was authored solely by *amicus curiae* and its counsel and that no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties were notified of *amicus curiae*'s intention to file this brief in accordance with Supreme Court Rule 37, and all parties consent to the filing of this brief.

plea bargain negotiations, even where a plea agreement is not reached and the defendant is subsequently convicted in a fair trial. *See Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *see also Missouri v. Frye*, 132 S. Ct. 1399 (2012). This Court held that defendants claiming ineffective assistance may obtain relief if they can make the showing required by *Strickland v. Washington*, 466 U.S. 668 (1984): first, that counsel's performance fell below an objective standard of reasonableness and second, that this deficiency had a reasonable probability of affecting the outcome of his case. Applied to the plea-bargain context, *Strickland*'s prejudice prong requires a defendant to show a "reasonable probability" that, but for counsel's ineffectiveness, "the plea offer would have been [accepted and] presented to the court . . ., that the court would have accepted its terms, and that the conviction or sentence . . . would have been less severe than . . . the judgment and sentence that in fact were imposed." *Lafler*, 132 S. Ct. at 1385. The Court did not suggest that anything more was required.

Despite *Lafler*'s clarity on this point, the State urges this Court to adopt a far more stringent standard—one that would require a defendant to come up with some quantum of unspecified "objective evidence" that he would have accepted a plea—and would consequently forbid the trial judge from concluding that relief is warranted in the absence of such evidence. Under the State's theory, absent this "objective evidence," a defendant who testifies credibly that he would have accepted the plea, where the sentence offered was less than the sentence the defendant received after trial, is categorically ineligible for a remedy for the violation of his or her Sixth

Amendment rights. *See* Petr. Br. 39–45. But the State's position is made up out of whole cloth—and, once unraveled, is supported by neither *Lafler*, nor *Strickland*, nor the very court of appeals decisions the State relies on for support.

A survey of existing jurisprudence reveals that in reality, the circuit courts have, without exception, looked to all of the circumstances surrounding a rejected plea offer, without limiting themselves to a particular type of evidence in determining whether there is a "reasonable probability" of prejudice. And with good reason: The "reasonable probability" test articulated by *Strickland* is not a particularly stringent one. In many cases, once a petitioner establishes that his counsel's performance during the plea bargain process was constitutionally deficient, the record itself makes plain that, but for the misadvice of counsel, the defendant would have accepted the plea. Yet under the State's position, courts faced with both a defendant's credible testimony that he would have taken the plea and a significant disparity between the sentence offered and the sentence imposed would now be prohibited from making the commonsense finding that the defendant was prejudiced. Such a radical departure from precedent would do nothing but restrict the discretion normally afforded to trial courts to engage in such fact-specific inquiries and, in the end, force courts to over-punish defendants who would otherwise be entitled to relief under *Lafler*.

For these reasons, the Court should adhere to its recent ruling in *Lafler* and allow trial courts to continue to employ their traditional and well-grounded discretion to review the facts of a particular case, hear the evidence, make credibility determinations, and

ultimately decide whether or not there is a "reasonable probability" that a particular defendant would have accepted a plea based upon the totality of the factual circumstances. No additional "objective evidence" test should be required.

ARGUMENT

I. THE STATE'S POSITION IS FORECLOSED BY THIS COURT'S PRECEDENT

The State argues that "self-serving, post-trial litigation assertions [that a defendant would have taken a plea] are insufficient," as a matter of law, to show prejudice. Petr. Br. 4. It urges this Court to superimpose a so-called "objective evidence" standard requiring a defendant who was deprived of his constitutional right to effective assistance of counsel to adduce some additional "evidence" beyond his credible testimony to prove that he would have accepted the plea. *See id.* But neither the Constitution nor this Court have ever required a defendant to adduce a particular type of evidence to establish prejudice, and there is no basis in law or policy for this Court to adopt the State's proposed additional requirement.

As a threshold matter, the State's argument is foreclosed by *Lafler*, which applied the *Strickland v. Washington* test, without additional varnish, to a Sixth Amendment violation at the plea bargain phase. That test has been applied by the courts in ineffective assistance cases for almost four decades and does not contain an "objective evidence" requirement. Under *Strickland*, a defendant need only show "that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result in the proceeding

would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). As the Court has repeatedly explained, a "reasonable probability" standard is less demanding than a preponderance standard. *See id.* at 693; *see also Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Nix v. Whiteside*, 475 U.S. 157, 175 (1986). Yet by requiring a defendant to produce "objective evidence," the State's position arbitrarily requires more. Under the State's theory, a trial judge could be convinced beyond a reasonable doubt that, under the facts of the case, the defendant would have taken the plea. Yet he would be powerless to grant relief unless that finding was made on a record that included some specific type of evidence. There is no basis in *Strickland* or *Lafler* or otherwise for heightening a defendant's burden to show prejudice merely because the constitutional violation occurred during the plea bargain stage.

Instead, the determination of prejudice requires a holistic inquiry based on the totality of the factual circumstances as to whether a "reasonable probability" of prejudice has been shown on the record. This approach is not only sound as a matter of Supreme Court precedent, but is the approach that has, in practice, been used by every circuit court to decide the issue, regardless of whether they speak of requiring "objective evidence."

II. THE STATE'S POSITION IS CONTRADICTED BY CIRCUIT COURT PRECEDENT AS WELL

A. There Is No Meaningful Circuit Split Because Every Circuit In Practice Employs A "Totality Of The Circumstances" Test

In lieu of supporting its proffered "objective evidence" argument with precedent or reason, the State offers a conclusory string-cite of circuit cases that it claims require "objective evidence." Petr. Br. 41. But not one of those cases stands for the proposition the State urges: Even the circuits that invoke an "objective evidence" requirement have found that requirement met where the circumstances themselves reflect a likelihood of prejudice. Not one circuit has adopted the proposed one-size-fits-all requirement that a defendant must adduce "objective evidence" beyond the defendant's credible testimony (coupled with an actual disparity between the sentence offered and that received) or suffer automatic denial of his claim, regardless of the nomenclature used.

The State argues that the Second, Seventh, Eighth, Tenth and Eleventh Circuits "have all held . . . that a defendant's post-conviction statement that he would have accepted a plea offer is *not* sufficient to show *Strickland* prejudice, and that some objective evidence of the defendant's intent is required." Petr. Br. 41 (emphasis in original). Not so.

In *United States v. Gordon*, 156 F.3d 376 (2d Cir. 1998), for example, the Second Circuit held that a defendant's post-conviction statement concerning his intentions *did* suffice to show prejudice—at least

where that statement was coupled with a significant disparity between defendant's actual maximum sentencing exposure and the sentencing exposure represented by his attorney. *See id.* at 381 ("[S]uch a disparity provides sufficient objective evidence—when combined with a petitioner's statement concerning his intentions—to support a finding of prejudice under *Strickland*."). Indeed, the United States essentially concedes as much in its amicus brief. U.S. Br. 19–20 (explaining *Gordon* found that "'a great disparity between the actual maximum sentencing exposure represented by defendant's attorney' was 'sufficient objective evidence to establish prejudice'" under the facts of the case).

The Second Circuit has since found, under *Gordon*, that "a great disparity between the actual sentence and the sentence that effective counsel would have secured for the defendant [in a plea deal] provides sufficient objective evidence . . . to support a finding of prejudice under *Strickland*." *Mask v. McGinnis*, 233 F.3d 132, 141 (2d Cir. 2000) (internal brackets omitted); *see also Raysor v. United States*, 647 F.3d 491, 495–96 (2d Cir. 2011) (same). Of course, both *Lafler* and common sense dictate that a sentencing disparity must be present to show prejudice: if the defendant is ultimately given the same sentence as that offered under the plea, it would be logically impossible to show the outcome would have been any different had he pled guilty, at least in cases where the conviction under the plea was the same as the judgment at trial. Thus, in essence, the Second Circuit is not really requiring any "objective evidence" at all.

Resolving any doubt on this score, the Second Circuit has since clarified that "*Gordon* is a simple

recognition that in most circumstances a convicted felon's self-serving testimony is not likely to be credible," not a *per se* rule that "objective evidence" is required in every case. *Purdy v. Zeldes*, 337 F.3d 253, 259 (2d Cir. 2003). As such, a mere lack of a corroboration "does not relieve habeas courts of their responsibility to actually make a credibility finding in each case, even absent objective evidence." *Id.* The Second Circuit's rule could not be clearer: prejudice turns on whether, under the totality of the circumstances, the defendant's testimony that he would have accepted a plea offer for a lesser sentence is to be believed. It emphatically does not require any "objective evidence" before prejudice can be found.

Nor has the Seventh Circuit required "objective evidence" as a rule. The State's reliance on *Paters v. United States*, 159 F.3d 1043 (7th Cir. 1998), and *Toro v. Fairman*, 940 F.2d 1065 (7th Cir. 1991), for the proposition that "objective evidence" is a mandatory requirement for prejudice claims is misplaced. Petr. Br. 41. To be sure, those cases use the phrase "objective evidence." But the Seventh Circuit plainly has not established a rule that credible testimony is insufficient in all cases. As that court stated in *Julian v. Bartley*, 495 F.3d 487 (7th Cir. 2007), *Paters* and *Toro* "merely comment on the insufficiency of solitary pieces of evidence" specific to those cases. *Id.* at 499.

In *Julian* itself, the court found the defendant had shown prejudice based on his post-conviction testimony that he would have taken a 23-year plea had he been properly advised the maximum possible term was 60, not 30, years. *Id.* at 498–99. As the court explained, "[i]t [would be] hard to imagine . . . [in such circumstances] that any reasonable defendant would be

willing to risk thirty-seven years for the remote chance of acquittal." *Id.* at 499. In so finding, the Seventh Circuit made no mention of an "objective evidence" requirement. *See id.*

Nor has the Eleventh Circuit adopted the State's proposed test. *Diaz v. United States*, 930 F.2d 832 (11th Cir. 1991), cited by the State, is entirely inapposite. Petr. Br. 41. In that case, the defendant claimed his attorney erred in advising him that a 5-year plea offer was "bullshit." *Diaz*, 930 F.2d at 834. As to prejudice, however, the defendant failed to even "*allege* that but for his attorney's errors, he would have accepted the plea offer." *Id.* at 835. Accordingly, *Diaz* stands only for the unremarkable proposition that a defendant who has presented *no* evidence of his intent to plea—subjective, objective or otherwise—cannot show prejudice. *Id.* It does not come close to establishing a *per se* rule that "objective evidence" beyond credible testimony is required.

The unpublished Eighth and Tenth Circuit cases offered by the State equally miss the mark. The State claims the Eighth Circuit has adopted the objective evidence test. *See* Petr. Br. 41. It has not. *Moses v. United States*, 175 F.3d 1025 (8th Cir. 1999) (per curiam) (unpublished), simply does not stand for the proposition the State asserts. In that case, the Eighth Circuit stated only that a defendant "must present some non-conclusory, credible evidence" and that a defendant's allegations need not be credited where they are "contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Id.*; *see also Sanders v. United States*, 341 F.3d 720, 722 (8th Cir. 2003). Critically, however, the Eighth Circuit has never said that a defendant's own

testimony can never suffice to show prejudice even where that testimony is found credible. To the contrary, the Eighth Circuit has explained only that a lack of corroborating evidence may make it less likely that the trial court will find the defendant credible in the first instance. *See United States v. Luke*, 686 F.3d 600, 606 (8th Cir. 2012) (finding the "district court did not clearly err in finding [defendant] not credible" in part because there were "[n]o emails, letters, or any other communication documents" to corroborate his testimony).

Nor has the Tenth Circuit ever required "objective evidence" as the State claims. The State relies on *Bachicha v. Shanks*, 66 F.3d 338 (10th Cir. 1995) (unpublished), *reported in full at* 1995 WL 539467 (10th Cir. Aug. 31, 1995).[2] But in that case, the defendant's testimony was supported by his sister's testimony. Nonetheless, the Court ruled that the district court "heard the testimony and observed the witnesses firsthand" and, therefore, his conclusion that the "petitioner failed to provide objective evidence" was not clear error. *Id.* at *2. In context, then, it is evident that the Tenth Circuit was not adopting a requirement for all cases for all time that objective evidence is required before a court can find prejudice, but rather

---

[2] The State's two other Tenth Circuit citations offer even less support. Neither *Maldonado v. Archuleta*, 61 F. App'x 524 (10th Cir. 2003) (unpublished), nor *United States v. Morris*, 106 F. App'x 656 (10th Cir. 2004) (unpublished), even use the phrase "objective evidence," much less announce a rule that such evidence is required in every case, regardless of the credibility of the defendant. Moreover, both of those cases arose in situations where the defendant claimed ineffective assistance in accepting a plea bargain, not, as here, where the defendant claimed ineffective assistance in rejecting one. *See id.*

found that the defendant's sister in that particular case was not credible.

The State's mischaracterization of these decisions is very troubling. A plain reading of the cases in the lower courts makes obvious that there is simply no circuit conflict on this issue. Although in many instances a defendant's uncorroborated, self-serving statement is unlikely to be believed without some additional evidence (which may consist of a significant disparity in sentence), this does not mean that circuit courts have instituted some rigid, threshold requirement that "objective evidence" of prejudice must be produced before a court is permitted to grant relief. Instead, each and every circuit[3] employs a

---

[3] The First, Third, Fourth, Fifth and Ninth Circuits have not adopted the purported "objective evidence" test. Although some circuits have expressly declined to rule on the issue while others have remained silent, all circuits, in practice, undertake a holistic, totality of the circumstances test. *See, e.g., Tse v. United States*, 290 F.3d 462, 464 (1st Cir. 2002) (declining to rule on whether "objective evidence" is required because district court did not make final determination as to prejudice); *United States v. Day*, 969 F.2d 39, 45 (3d Cir. 1992) (acknowledging that the Seventh Circuit claims to use an "objective evidence" test but declining to rule on the issue because on remand the defendant could provide evidence from his lawyer to confirm prejudice); *Merzbacher v. Shearin*, 706 F.3d 356, 366–67 (4th Cir. 2013) (acknowledging that the Seventh Circuit claims to use an "objective evidence" test, but declining to rule on the issue because defendant was not credible); *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995) (not acknowledging "objective evidence" test and finding defendant provided sufficient basis to find prejudice where he stated that he "would have obviously taken the offer into serious consideration," even though he did not "unequivocally state that he would have accepted the plea"); *Nunes v. Mueller*, 350 F.3d 1045, 1055 n.6 (9th Cir. 2003) (noting that a "universal requirement of corroboration is in substantial tension with *Strickland*," but refusing to decide the

Strickland-based inquiry grounded in the facts of the case to determine whether the defendant's statements that he would have taken the plea are credible and whether the facts as a whole establish a "reasonable probability" of prejudice. Under this universal approach, a defendant is deemed to have demonstrated a "reasonable probability" he would have taken the plea where: (1) counsel's conduct is truly egregious in misadvising or failing to advise the defendant about the plea deal, (2) the sentencing disparity is significant, and (3) the defendant credibly testifies that he would have accepted the plea had he been properly advised. This list is not exhaustive, but rather illustrative of the fact that there is no basis for requiring evidence of a particular type.

B. Even The Isolated Cases That Have Used The "Objective Evidence" Terminology Have Construed It So Broadly As To Render It Meaningless And Confusing

Importantly, even those courts that have used the phrase "objective evidence" have, much like the State, failed to define it in a meaningful way. Instead, these courts generally define the requirement in the negative—i.e., that a defendant's self-serving testimony is not enough—without explaining, affirmatively, what is required by "objective evidence." *See, e.g.*, *Toro*, 940 F.2d at 1068. Rather than state a general rule, these courts have taken a case-by-case approach, either cherry picking examples of "objective evidence" based on the specific facts of the case

---

issue because in that case, the defendant "*did* present objective corroborative evidence" (emphasis in original)).

immediately before it or stating in a conclusory manner that no objective evidence exists. Without any guiding principle, the courts have found satisfactory a wide variety of such "evidence," without ever defining what such a requirement really means.

To give just a few examples, courts have found a defendant satisfies his burden to produce "objective evidence" through (1) testimony from counsel that he believes his client would have taken the plea, *see, e.g.*, *United States v. Day*, 969 F.2d 39, 45 (3d Cir. 1992); *Illinois v. Curry*, 687 N.E.2d 877, 888 (Ill. 1997), (2) testimony from the prosecutor that the deal had been offered, *see, e.g.*, *Paters v. United States*, 159 F.3d 1043, 1047 n.6 (7th Cir. 1998), (3) testimony from co-defendants that the defendant had a generally compliant personality, and so probably would have followed counsel's advice if he had been advised to plead, *see, e.g.*, *Hoffman v. Arave*, 455 F.3d 926 (9th Cir. 2006), *vacated as moot by* 552 U.S. 117 (2008), (4) evidence that the attorney had "good control" of his client, *see, e.g.*, *In re Alvernaz*, 830 P.2d 747, 757 (Cal. 1992), (5) evidence that the defendant generally followed counsel's advice on other issues, such as whether to testify at trial, *see, e.g.*, *Williams v. Maryland*, 605 A.2d 103, 110 (Md. Ct. App. 1992), (6) the defendant's admission of some level of guilt, *see, e.g.*, *Wolford v. United States*, 722 F. Supp. 2d 664, 691 (E.D. Va. 2010), (7) affidavits from parents or friends that the defendant was seriously considering the deal, *see, e.g.*, *Alvernaz v. Ratelle*, 831 F. Supp. 790, 795 (S.D. Cal. 1993), (8) a pro se letter from the defendant proposing a plea, *see, e.g.*, *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012), (9) the defendant's counteroffer to a plea offer, *Turner v. Tennessee*, 858 F.2d 1201, 1206

(1988), *vacated on other grounds*, 492 U.S. 902 (1989), (10) the active pursuit of a plea until the day before trial, *see, e.g.*, *Carmichael v. Colorado*, 206 P.3d 800, 807 (Colo. 2009) (en banc), (11) the defendant's participation in multiple settlement conferences, *see, e.g.*, *Alvernaz v. Ratelle*, 831 F. Supp. 790, 795 (S.D. Cal. 1993), (12) "[t]he potential strength of the state's case," *see, e.g.*, *Ostrander v. Green*, 46 F.3d 347, 356 (4th Cir. 1995), (13) the fact that the defendant had only a "legal" defense to present at trial that would merely reduce the offense if successful, *see, e.g.*, *Wanatee v. Ault*, 101 F. Supp. 2d 1189, 1206 (N.D. Iowa 2000), (14) the fact that the attorney misconduct is of the type that would normally affect a defendant's decision to plead, *see, e.g.*, *Julian v. Bartley*, 495 F.3d 487 (7th Cir. 2007), (15) the disparity between the actual maximum sentence and the maximum sentence represented by counsel, *see, e.g.*, *United States v. Hernandez*, 450 F. Supp. 2d 950, 978 (N.D. Iowa 2006), (16) a significant disparity between the sentence offered in the plea and the sentence received, *Mask v. McGinnis*, 233 F.3d 132, 142–43 (2d Cir. 2000), and, perhaps most relevant here, (17) evidence that the defendant had previously pled guilty in the same case, which "suggests that he was willing to forego his day in court, at least before he was [misadvised]," *see, e.g.*, *Lewandowski v. Makel*, 949 F.2d 884, 890 (6th Cir. 1990).

The only common thread among these pieces of so-called "objective evidence" is that they all, at bottom, simply reflect a trial court's judgment that the defendant has demonstrated a "reasonable probability" that he would have taken the plea. Thus, although some courts have indeed used the term "objective evidence," they use that term to refer merely to the

wide array of information, facts, testimony and evidence—from testimony from family members to the actual entry of a guilty plea—that might affect a court's evaluation of the factual circumstances as a whole. As such, the "objective evidence" label favored by some judges is not only unnecessary, but confusing.

Given the uncertain meaning of the "objective evidence" requirement, it is unsurprising that courts have been wildly inconsistent in what they require under this "standard." In *Mask*, for example, the Second Circuit found that a significant disparity between the sentence offered and the sentence received constituted "objective evidence" that the defendant would have accepted the plea had he been properly advised. 233 F.3d at 141. In *Paters*, however, the Seventh Circuit held just the opposite, instructing lower courts to "focus[] exclusively on the objective evidence standard and disregard[] the degree of disparity between the . . . proposed plea agreement and . . . actual sentence." 159 F.3d at 1046. Similarly, while some courts have held that a family member's testimony that the defendant would have taken a plea can constitute "objective evidence," *see, e.g.*, *Alvernaz v. Ratelle*, 831 F. Supp. 790, 794 (S.D. Cal. 1993), other courts have squarely held that it cannot, *see, e.g.*, *Broadwater v. United States*, Nos. 204CV307+, 2005 WL 1712261, at *10 (N.D. Ind. July 21, 2005); *Slevin v. United States*, 71 F. Supp. 2d 348, 362 (S.D.N.Y. 1999). In light of this confusion, this Court would do best to eliminate this arbitrary and meaningless label, and instead require all courts to evaluate evidence of all types—including the defendant's own statements and the disparity between the sentence offered and received—to determine whether there is a reasonable

probability that the defendant would have accepted the plea.

III. ADOPTING THE STATE'S POSITION WOULD LEAD TO UNJUST RESULTS

In addition to lack of jurisprudential or constitutional grounding, an inflexible rule forbidding a trial court from finding prejudice absent "objective evidence" of the type the State would require would raise grave fairness concerns. Specifically, superimposing the "objective evidence" test on the prejudice requirement deprives a trial judge of the discretion to grant relief to a person who received constitutionally inadequate advice and credibly testifies that he relied on that advice to his detriment. Such a rule would lead to several categories of problematic outcomes.

As an initial matter, there are many cases of egregious attorney misconduct where it would be incredibly unjust to require the over-punishment of an individual merely because he may not have anyone willing to testify on his behalf in post-conviction proceedings. In such cases, courts should be able to recognize that the attorney's conduct is so outrageous that it is obvious from the record itself that there is a "reasonable probability" that the defendant would have pled guilty had he not been actively misled by the attorney who is supposed to be acting in his interest.

In *Pennsylvania v. Napper*, 385 A.2d 521 (Pa. Super. Ct. 1978), for example, prosecutors offered a plea deal involving a sentence of one to three years' imprisonment for multiple robberies and associated charges. Defense counsel mentioned the offer only in an "offhand" way to the defendant without advising him of the benefits of taking the deal or his potential

exposure at trial because he was eager to have his first jury trial, and so did not want his client to plead. *Id.* at 523. The case "was a stone cold loser" with no potential defenses. *Id.* Unsurprisingly, the defendant was found guilty on all counts and sentenced to ten to forty years. *Id.* at 521. In such a case, the circumstances alone demonstrate a "reasonable probability" that the defendant would have taken the deal had he been properly advised.

Similarly, in *Beckham v. Wainwright*, 639 F.2d 262 (5th Cir. 1981), defense counsel negotiated a five-year plea deal for robbery and associated charges, which the defendant accepted. Defense counsel then recommended the defendant withdraw the plea, advising that the defendant could have a trial only on the issue of whether he was sane at the time of the offense. *Id.* at 266. Counsel advised that even if he was found sane, the five-year agreement on the sentence would still stand. *Id.* Defense counsel was very wrong. Upon this advice, the defendant not only withdrew his plea, but stipulated to the elements of the offense. *Id.* at 263–64. The jury found him guilty and sane, and the court sentenced him to fifty years in prison. *Id.* at 263. This level of ineffectiveness is astounding, and no "objective evidence" is needed to show that there is a "reasonable probability" that the defendant would not have withdrawn his five-year plea agreement—and stipulated to the elements of the crime—had he known he could have been sentenced to fifty years.

A more recent case demonstrating this principle is *United States v. Soto-Lopez*, 475 F. App'x 144 (9th Cir. 2012) (unpublished). In *Soto-Lopez*, the public defender negotiated a four-year deal for his client, Soto-Lopez, who was charged with illegal reentry into the United States. *Id.* at 146. A private attorney, De Olivas,

convinced Soto-Lopez to fire his publicly-appointed attorney and pay him $4000, promising he could secure a better two to two-and-a-half year deal, despite the fact that he had no experience negotiating with the prosecutors in that district and that such a deal was utterly unlikely. *Id.* Once hired, De Olivas advised Soto-Lopez to withdraw his plea, sent one letter to the prosecutor asking for a two-and-a-half-year deal, and ultimately advised Soto-Lopez to plead guilty without any plea agreement at all. *Id.* Soto-Lopez was then sentenced to approximately six and a half years in prison. *See Soto-Lopez v. United States*, Nos. 07cr3475+, 2011 WL 176026, at *22 (S.D. Cal. Jan. 19, 2011). Between Soto-Lopez's plea hearing and sentencing, De Olivas was disbarred for "a dizzying range of unprofessional conduct," including for "plac[ing his] financial motivations above the interests of his client." *Soto-Lopez*, 475 F. App'x at 146. The district court described Soto-Lopez as "'probably . . . the victim of why [the attorney] was no longer practicing.'" *Id.* The Ninth Circuit found prejudice based on the facts of the case alone, reasoning that "[i]f De Olivas had not counseled Soto-Lopez that he could receive a 24-or 30-month sentence, and instead been adequately advised as to the dramatic differences in potential sentences, Soto-Lopez would not have rejected the government's plea." *Id.* at 147.

Notably, the Ninth Circuit did not mention if Soto-Lopez ever submitted a declaration that he would have accepted the plea. Instead, the Ninth Circuit based its prejudice finding entirely on the fact that "[u]ntil De Olivas advised Soto-Lopez to withdraw from the deal, both the government and Soto-Lopez were taking the procedural steps towards satisfying the terms of the fast-track deal" and that he "abruptly changed course

once he encountered De Olivas." *Id.* Here, too, the fact that Titlow was taking steps to enter the plea but "abruptly changed course" suggests that counsel's deficient advice affected the outcome of the case. In cases like this—where the sequence of events speak volumes about prejudice—courts should not be unreasonably prevented from granting relief because the defendant could not come up with "objective evidence" (whatever that means) to support his claim of prejudice.

These cases exemplify why trial judges need flexibility and discretion: Trial judges oversee plea agreements and criminal trials day in and day out. These frontline judges are in the best position to evaluate whether, under the facts of the case as a whole, common sense dictates that any properly-advised defendant would have taken a plea. Requiring more than the defendant's credible testimony in such cases would deprive the defendant of any remedy for the abject constitutional deficiency of counsel during the critical plea negotiation stage.

To find that the defendant's credible testimony could *never* suffice to show prejudice is also unfair to defendants who may not have the ability to provide "objective evidence" through no fault of their own. Under the rule proposed by the State, a defendant who has shown constitutionally defective counsel would be unable to get relief because he does not have a friend, family member or attorney willing to submit a declaration on his behalf, when almost identically situated defendants may be able to make a successful claim. As various Justices have explained, "the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment 'hardly comports with the ideal

of 'administration of justice with an even hand.'" *Teague v. Lane*, 489 U.S. 288, 315 (1989) (O'Connor, J., concurring) (quoting *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977) (Powell, J., concurring in judgment)); *see also Henderson v. United States*, 133 S. Ct. 1121, 1127 (2013) (rejecting prosecutor's argument because "[t]o hold to the contrary would bring about unjustifiably different treatment of similarly situated individuals"). Yet the State's position here flies in the face of these long-standing principles of evenhandedness by denying a trial court any discretion to grant habeas relief merely because a given defendant may not have anyone willing to vouch for his claim of prejudice.

Such a miscarriage of justice is of greatest concern in capital cases, where defendants sometimes reject life-saving plea offers based on the deficient or nonexistent advice of counsel. *See, e.g., Hoffman v. Arave*, 455 F.3d 926 (9th Cir. 2006), *vacated as moot by* 128 S. Ct. 749 (2008). As Justice Blackmun once recognized, "[t]he consequences of . . . poor trial representation for the capital defendant, of course, can be lethal." *McFarland v. Scott*, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting from the denial of the writ of certiorari); *see also Kennedy v. Louisiana*, 554 U.S. 407, 428 (2008) ("[T]he death penalty . . . 'is unique in its severity and irrevocability.'"). This statement is equally true in the plea-bargain context. To allow the execution of individuals solely because they cannot come up with "objective evidence" cannot be squared with fundamental principles of justice that permit capital punishment only where society can be confident in the constitutionality of the proceedings leading to the conviction and sentence. *See Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Because the death penalty is

the most severe punishment, . . . [it] must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"); *Whitmore v. Arkansas*, 495 U.S. 149, 168 (1990) (Marshall, J., dissenting) ("Because there is a qualitative difference between death and any other permissible form of punishment, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" (internal brackets and quotation marks omitted)).

IV. PRESERVING TRIAL COURTS' DISCRETION TO FIND PREJUDICE UNDER *STRICKLAND* WILL NOT RESULT IN A FLOOD OF FRIVOLOUS CLAIMS

Finally, there is no reason to believe that rejecting the State's position will cause a sudden deluge of frivolous claims.

As discussed above, the fact-intensive inquiry advocated here is, in reality, the approach already taken by every circuit in the country—the State's misleading arguments notwithstanding. As such, there are simply no "floodgates" to be thrown open. As the Court explained in *Lafler*, "[c]ourts have recognized claims of this sort for over 30 years, and yet there is no indication that the system is overwhelmed by these types of suits or that defendants are receiving windfalls as a result of strategically timed *Strickland* claims." *Lafler*, 132 S. Ct. at 1389–90 (internal citation omitted). Accordingly, there is demonstrably no risk that affirming the Sixth Circuit's test will cause an *increase* in such claims.

Nor are lower courts overwhelmed by the current level of these ineffective assistance claims. Trial judges are highly experienced in distinguishing legitimate claims from wishful thinking in a timely and efficient manner. As multiple courts have explained in rejecting this precise argument, "to the extent that petitioners and their trial counsel may jointly fabricate these claims [of ineffective assistance in plea negotiations] later on, the district courts will have ample opportunity to judge credibility at evidentiary hearings." *Griffin v. United States*, 330 F.3d 733, 739 (6th Cir. 2003) (quoting *United States v. Day*, 969 F.2d 39, 46 n.9 (1992)); *Alvernaz v. Ratelle*, 831 F. Supp. 790, 799 (S.D. Cal. 1993) (same). If the courts that are tasked with applying these principles are unconcerned, this Court need not be concerned on their behalf.

At bottom, because the trial court has the ability to hold hearings and make factual findings on these issues, there is little danger that courts would be inundated with meritless petitions or that they would somehow be forced to release defendants who rely on nothing but their own self-serving testimony that they would have accepted the plea. Trial courts know a simple case of "buyer's remorse" when they see it.

Just because the defendant's testimony that he would have taken the deal might, in some circumstances, suffice to show a "reasonable probability" of prejudice does not mean that it always will. Judges have the wisdom and experience to make credibility determinations, and can discount a defendant's statements if his testimony appears to be mere gamesmanship in an attempt to get the benefit of a rejected plea deal. The flexibility to weigh all the evidence, make credibility determinations, and

evaluate whether or not prejudice has been shown under the specific facts of a given case is exactly the type of fact-finding trial courts routinely make—even in this very context.

For similar reasons, any concern that federal courts will somehow be forced to grant relief for meritless claims and thereby undermine principles of comity is equally misplaced. *Cf.* Conn. Br. 20–25. Under AEDPA's highly-deferential standard of review, federal courts would not be able to overturn the state's determination unless it was based on an "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). Thus, there is little reason to doubt that instances in which a federal court is required to overturn a state's finding on prejudice will remain rare.

If anything, empowering state courts to evaluate all the facts and circumstances of a given case in determining whether a defendant has been prejudiced by ineffective assistance of counsel will likely insulate that fact-intensive decision from inappropriate second-guessing by the federal courts—at least compared to the "objective evidence" test the State implores the Court to adopt without defining what such a test would mean. Such an approach would do nothing but reap confusion and invite error in the courts below. Remaining faithful to *Lafler*, however, and continuing to give state courts broad discretion in the types of evidence they can consider in evaluating Sixth Amendment claims in the plea bargain context neither infringes states' rights nor implicates comity concerns.

The irony of the State's position is evident: When it comes to deciding the remedy, the State would give the state trial judge all the discretion in the world. Petr. Br. 48 (complaining that "the Sixth Circuit improperly

limited the trial court's discretion" in fashioning a remedy). For prejudice, however, the State believes the trial judge should be deprived of any discretion to grant relief to a defendant who has received constitutionally defective assistance in the plea bargain stage even if he credibly testifies he would have taken the deal and the sentence imposed is significantly higher than the original plea.

Every court to have addressed the issue—including this Court in *Lafler* just two Terms ago—has properly concluded that the decision to grant habeas relief on an ineffective assistance of counsel claim turns on whether there is a "reasonable probability" that the outcome of the proceedings would have been different had counsel provided adequate advice. The Court's conclusion should be no different here. There is no reason—and the State has offered none—to depart from this well-grounded precedent and impose an additional and unclear requirement of "objective evidence." Such a rule would do nothing but deprive the trial court of the flexibility to make prejudice determinations and deprive deserving defendants of the ability to obtain habeas relief for their constitutional claims.

CONCLUSION

This Court should reject the State's proposed "objective evidence" test in favor of directing courts to examine the totality of the factual circumstances and hold that a defendant need not adduce any particular type of evidence to demonstrate a reasonable probability that he would have accepted a pending plea offer for a lesser sentence, but for counsel's unprofessional errors. In short, this Court should defer to the trial courts as to type of evidence required in a particular case for the defendant to make this showing.

Respectfully submitted,

NANCY HOPPOCK
CENTER ON THE
ADMINISTRATION OF
CRIMINAL LAW
139 MacDougal Street
3rd Floor
New York, NY 10012
(212) 998-6612

DANIEL MERON
Counsel of Record
LORI ALVINO MCGILL
STEPHANIE N. GRACE
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
Daniel.Meron@lw.com
(202) 637-2218

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUN 17 2013
OFFICE OF THE CLERK

No. 12-414

In The

Supreme Court Of The United States

SHERRY L. BURT,
Petitioner,

v.

VONLEE TITLOW,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE CONNECTICUT AND 34 OTHER STATES IN SUPPORT OF PETITIONER

KEVIN T. KANE
Chief State's Attorney

MICHAEL J. PROTO*
Assistant State's Attorney
Office of the Chief State's Attorney
Civil Litigation Bureau
300 Corporate Place
Rocky Hill, CT 06067
Michael.Proto@ct.gov
Tel. (860) 258-5887
Fax (860) 258-5968

*Counsel of Record

(additional counsel for amici curiae listed inside front cover)

service by
BRESCIA'S
CALL 800.842.0008

ADDITIONAL COUNSEL

LUTHER STRANGE
Attorney General
of Alabama
501 Washington Ave.
Montgomery, AL 36130

TOM HORNE
Attorney General
of Arizona
1275 W. Washington St.
Phoenix, AZ 85007

KAMALA D. HARRIS
Attorney General
of California
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244

JOHN W. SUTHERS
Attorney General
of Colorado
1300 Broadway
10th Floor
Denver, CO 80203

JOSEPH R. BIDEN, III
Attorney General
of Delaware
820 North French St.
Wilmington, DE 19801

SAMUEL S. OLENS
Attorney General
of Georgia
40 Capitol Square
Atlanta, GA 30334

PETER F. KILMARTIN
Attorney General
of Rhode Island
45 Washington Sq.
Newport, RI 02840

LISA MADIGAN
Attorney General
of Illinois
100 W. Randolph St.
12th Floor
Chicago, IL 60601

DEREK SCHMIDT
Attorney General
of Kansas
120 S.W. 10th Avenue
2nd Floor
Topeka, KS 66612

BUDDY CALDWELL
Attorney General
of Louisiana
1885 N. Third Street
Baton Rouge, LA 70802

JANET T. MILLS
Attorney General
of Maine
Six State House Station
Augusta, ME 04330

GARY K. KING
Attorney General
of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504

DUSTIN McDANIEL
Attorney General
of Arkansas
323 Center Street
Little Rock, AR 72201

GREGORY A. PHILLIPS
Attorney General
of Wyoming
123 State Capitol
Cheyenne, WY 82002

JOHN E. SWALLOW
Attorney General
of Utah
Utah State Capitol
Suite 230
P.O. Box 142320
Salt Lake City, UT 84114

MARTY J. JACKLEY
Attorney General
of South Dakota
1302 E. Highway 14
Suite 1
Pierre, SD 57501

CHRIS KOSTER
Attorney General
of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

J.B. VAN HOLLEN
Attorney General
of Wisconsin
114 East Capitol
Madison, WI 53702

ROBERT W. FERGUSON
Attorney General
of Washington
1125 Washington St. SE
P.O. Box 40100
Olympia, WA 98504

JOSEPH A. FOSTER
Attorney General
of New Hampshire
33 Capitol Street
Concord, NH 03301

LAWRENCE G. WASDEN
Attorney General
of Idaho
P.O. Box 83720
Boise, ID 83720

GREGORY F. ZOELLER
Attorney General
of Indiana
302 W. Washington St.
Indianapolis, IN 46204

DOUGLAS F. GANSLER
Attorney General
of Maryland
200 St. Paul Place
Baltimore, MD 21202

LORI SWANSON
Attorney General
of Minnesota
102 State Capitol
75 M.L. King Jr. Blvd
St. Paul, MN 55155

CATHERINE CORTEZ MASTO
Attorney General
of Nevada
100 N. Carson Street
Carson City, NV 89701

KENNETH T. CUCCINELLI, II
Attorney General
of Virginia
900 East Main Street
Richmond, VA 23219

JON BRUNING
Attorney General
of Nebraska
2115 State Capitol
Lincoln, NE 68509

DAVID M. LOUIE
Attorney General
of Hawai'i
425 Queen Street
Honolulu, HI 69813

TIMOTHY C. FOX
Attorney General
of Montana
P.O. Box 201401
Helena, MT 59620

ALAN WILSON
Attorney General
of South Carolina
P.O. Box 11549
Columbia, SC 29211

E. SCOTT PRUITT
Attorney General
of Oklahoma
313 N.E. 21st Street
Ok. City, OK 73105

JACK CONWAY
Attorney General
of Kentucky
700 Capital Ave.
Suite 118
Frankfort, KY 40601

PAMELA JO BONDI
Attorney General
of Florida
The Capitol, PL-01
Tallahassee, FL 32399

GREG ABBOTT
Attorney General
of Texas
P.O. Box 12548
Austin, TX 78711

QUESTIONS PRESENTED

1. Whether the Sixth Circuit failed to give appropriate deference to a Michigan state court under AEDPA in holding that defense counsel was constitutionally ineffective for allowing respondent to maintain his claim of innocence.

2. Whether a convicted defendant's subjective testimony that he would have accepted a plea but for ineffective assistance, is, standing alone, sufficient to demonstrate a reasonable probability that defendant would have accepted the plea

3. Whether *Lafler* always requires a state trial court to resentence a defendant who shows a reasonable probability that he would have accepted a plea offer but for ineffective assistance, and to do so in such a way as to "remedy" the violation of the defendant's constitutional right.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 6

ARGUMENT 8

I. Introduction and Background 8

II. *Lafler* Does Not Require Resentencing in Accordance with the Plea Offer 9

III. Resentencing is Inappropriate Where, As Here, It Would Infringe Unnecessarily Upon Competing Interests in Appropriate Convictions and Sentences 11

IV. Resentencing is Inappropriate Where, As Here, It Fails to Consider Separation of Powers and Comity Principles 20

CONCLUSION 26

TABLE OF AUTHORITIES

CASES **PAGE**

Adell Broadcasting v. Apex Media Sales,
269 Mich. App. 6, 708 N.W.2d 778 (2005) 24

Apprendi v. New Jersey, 530 U.S. 466 (2000) 19

Bissell v. Edison Company, 9 Mich. App. 276,
156 N.W.2d 623 (1968) 24

Bordenkircher v. Hayes,
424 U.S. 357 (1978). 1, 17, 21

Dorszynski v. United States,
418 U.S. 242 (1974) 19

Ewing v. California, 538 U.S. 11 (2003) 17

Kennedy v. Louisiana, 554 U.S. 407 17

Lafler v. Cooper, 132 S.Ct. 1376 (2012) . . . . . passim

Landa v. Schmidt, 362 Mich. 561,
107 N.W.2d 816 (1961) 24

Mabry v. Johnson, 467 U.S. 504 (1984) 16

Missouri v. Frye, 132 S.Ct. 1399 (2012). . . . . passim

Oregon v. Ice, 555 U.S. 160 (2009) 19

Puckett v. United States,
556 U.S. 129 (2009) 13, 16, 23

Ricketts v. Adamson,
483 U.S. 1 (1987) 7, 23, 24, 25

Roe v. Flores-Ortega, 528 U.S. 470 (2000) 10

Rooyakker & Sitz v. Plante & Moran,
276 Mich App. 146 (2007) 23

Ruiz v. United States, 551 U.S. 338 (2007) 19

Strickland v. Washington,
466 U.S. 668 (1984) 4, 8

Tapia v. United States, 131 S.Ct. 2382 (2011) 17

Titlow v. Burt, 680 F.3d 577 (2012) 5, 7, 9, 10

Town of Newton v. Rumery,
480 U.S. 386 (1987) 15, 21

United States v. Des Moines Nav. & Ry. Co.,
142 U.S. 510 (1892) 17

United States v. Goodwin, 457 U.S. 368 (1982) . . . 18

United States v. Morris,
633 F.3d 885 (9th Cir. 2011) 13

United States v. Morrison, 449 U.S. 361 (1981) . . .12

United States v. Rice,
607 F.3d 133 (5th Cir. 2010) 14

United States v. Ruiz, 536 U.S. 622 (2002). . . . 13, 14

United States v. Springs,
988 F.2d 746 (7th Cir. 1993) 16

Weatherford v. Bursey, 429 U.S. 545 (1977) 14

Williams v. New York, 337 U.S. 241 (1940) 19

Younger v. Harris, 401 U.S. 37 (1971) 21

CONSTITUTIONAL PROVISIONS

SIXTH AMENDMENT 8, 11, 12

CONN. CONST. Amd. XXIII 1

STATUTES

28 U.S.C.A. § 2254 4

Conn. Gen. Stat. § 51-278 (c). 1

MICH. COMP. LAWS § 750.1 et seq. 17

MICH. COMP. LAWS § 750.316 3

MICH. COMP. LAWS § 750.317. 4

RULES OF COURT

Rule 37(4) 1

OTHER MATERIALS

RESTATEMENT (SECOND)
OF CONTRACTS § 265 (1981) 23

6 Williston, Contracts (Rev. ed.) § 1931 24

INTEREST OF THE *AMICI CURIAE* [1]

The *amici* states have a compelling interest in the outcome of this case. As the Court has recognized, the vast majority of criminal cases are disposed of through plea bargaining. *Missouri v. Frye*, 132 S.Ct. 1399 (2012). The Court has stated that plea bargaining "*is* the criminal justice system." *Id.* at 1407 (citation omitted). The basis upon which plea bargaining's legitimacy has always been found is that plea bargaining carries *mutual* advantages – benefiting the defendant *and* the State. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

In this case, the State bargained for an advantage over and above the mere avoidance of trial and its associated costs. Here, the State sought the benefit of the defendant's testimony in the trial of the co-defendant. The State never received – and now can never receive – that benefit. This case is important to the states because it will inform their expectations with respect to the plea bargaining in which they engage.

This case is also important to the states because the states have an interest in convictions that are commensurate with the evidence and in the imposition of fitting punishments for criminal

---

[1] Rule 37(4) permits the Attorneys General to file amicus curiae briefs without permission of the parties. In Connecticut, the Chief State's Attorney serves as the equivalent of the Attorney General for criminal matters. CONN. CONST. Amd. XXIII; Conn. Gen. Stat. § 51-278(c). Accordingly, this brief is filed pursuant to Rule 37(4).

conduct. In this case, the Sixth Circuit acknowledged that the conviction that resulted from trial is appropriate to the respondent's conduct, and the appropriateness of the sentence in light of that conviction is not challenged. Nonetheless, the Sixth Circuit's focus is on correcting the attorney's alleged error in plea bargaining regardless of whether the result fails to meet criminal justice objectives. The states thus have a compelling interest in this case because it will decide whether the states' interest in appropriate results must cede to the correction of attorney error in plea negotiations. Therefore, the outcome of this case will shape the parameters of the states' considerations when plea bargaining – and the extent to which the states are willing to plea bargain – in the future.

In short, the outcome of this case will guide the states when deciding whether the risk – that an attorney's error in plea bargaining will deprive the State of the benefit it sought but nonetheless confer upon the defendant the compromised conviction or sentence – is too great to engage in plea bargaining at all. It is therefore a case in which the states have substantial interest.

STATEMENT OF THE CASE

The prosecution alleged that respondent, Vonlee Titlow, and her aunt, Billie Rogers, killed her uncle, Donald Rogers, for pecuniary gain.[2] Evidence proffered at the respondent's criminal trial advanced

---

[2] The facts set forth in the Statement section are summarized from the decisions of the courts below, which are included in the petitioner's appendix.

the State's theory that, to kill Donald, respondent and Billie held him down, poured vodka down his throat, and, ultimately, smothered him with a pillow. The pair took measures to conceal their crime, and Donald's death was originally classified as natural. However, through the respondent's confession to an informant, the police learned the real story.

Respondent and Billie were arrested in January 2001 and tried separately. Respondent was charged with first-degree murder, which exposed her to a mandatory life sentence.[3] However, a plea agreement followed. In exchange for her testimony in the prosecution against Billie, respondent pleaded guilty to manslaughter and would serve seven-to-fifteen years' incarceration. The trial court accepted respondent's plea in October 2001 and scheduled sentencing for December.

Respondent changed her mind before sentencing. She retained a second attorney and, through him, gave the State an ultimatum: Lower the sentencing range to three-to-fifteen years, or she would not testify against Billie. The State did not agree, and respondent moved to withdraw her plea. Respondent told the trial court she understood that the first-degree murder charge would be reinstated upon withdrawal of her plea. The trial court therefore allowed the withdrawal because respondent was declining to testify against Billie.

---

[3] MICH. COMP. LAWS § 750.316.

A jury convicted respondent of second-degree murder.[4] The trial court sentenced her to twenty-to-forty years of incarceration. The trial against Billie proceeded without respondent's testimony. Billie was acquitted (and later died).

In post-conviction proceedings, respondent claimed, in pertinent part, that her second attorney was ineffective for pursuing withdrawal of her plea. The claim was rejected through to the United States District Court. The District Court, construing the Anti-Terrorism and Effective Death Penalty Act of 1996 (28 U.S.C.A. § 2254), held that Michigan courts' rejection of the claim was neither contrary to nor an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), which sets forth clearly established federal law with regard to ineffective assistance claims. The court reasoned that the respondent's desire to withdraw her plea predated her second attorney's involvement, and that he was not ineffective for advising her to go to trial given that she asserted her innocence.

The Sixth Circuit reversed. Applying this Court's decision in *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), the Sixth Circuit held that respondent's counsel failed adequately to investigate her case and sufficiently advise her during the plea negotiation stage. The court held that respondent was thus prejudiced by the longer sentence she received after her constitutionally sound trial.

In reaching its decision, the Sixth Circuit did not conclude that the conviction resulting from the

---

[4] A second-degree murder conviction carries a sentence of up to life. MICH. COMP. LAWS § 750.317.

criminal trial was not just. In fact, the Court noted that the respondent's conviction and sentence fit her crime, stating:

> The State's evidence against [the respondent] was strong. Even [the respondent's] version of the facts was not inconsistent with a second-degree murder conviction, and her recorded conversation with [the informant] was highly incriminating.

Titlow v. Burt, 680 F.3d 577, 591 (2012).

Thus, to remedy respondent's loss of the opportunity to obtain the discounted conviction and sentence, the Sixth Circuit ordered respondent's release unless the State re-offers her the original plea deal. Should she accept the offer, the Sixth Circuit stated:

> [T]he state court may then exercise its discretion to fashion a sentence for [respondent] that both remedies the violation of her constitutional right to the effective assistance of counsel and takes into account any concerns that the State might have regarding the loss of [respondent's testimony] against her aunt.

Id. at 592-93.

In directing the state court to "fashion a sentence," the Sixth Circuit expressed that the remedy articulated by the Court in *Lafler* "could

become illusory if the state court chooses merely to reinstate [respondent's] current sentence." The Sixth Circuit directed the state court to consult the initial plea agreement as a baseline in crafting a new sentence, and warned that the failure to do so may result in further federal review.

SUMMARY OF THE ARGUMENT

This brief focuses on the third question presented, which asks whether the Court's decision in *Lafler* requires, as a remedy, that a defendant who forfeited a more favorable plea disposition due to ineffective assistance should *always* be resentenced in accordance with that disposition.[5] The case differs, factually, from *Lafler* and its companion case, *Frye,* insofar as the plea agreement here obligated the respondent to do more than simply plead guilty. Pursuant to the agreement, she was obligated to testify against a co-defendant.

That factual difference highlights why it is unsound to always require resentencing in the forfeited plea bargain context. Specifically, this case illustrates two scenarios in which resentencing in accordance with the original plea offer would be imprudent. First, a requirement that a defendant in this posture always be resentenced risks unnecessarily impinging upon the State's legitimate, competing interests in appropriate convictions and punishments. *Lafler* contemplates consideration of these interests, and allows that the plea terms should not serve as a basis for the remedy in these

---

[5] The *amici* states' focus, in this brief, on the remedy for ineffective assistance in the "lapsed plea" context is in no way a concession that there has been ineffective assistance here.

cases because those terms may not necessarily embody societal concerns that the criminal justice system is expected to address.

Second, in the scenario presented, the Sixth Circuit's order does not consider separation of powers and comity principles. Consideration of those principles makes it unwise to always require resentencing. Specifically, the Sixth Circuit's ruling here, in substance, provides that the state trial court order the prosecutor to extend a plea offer that was not contemplated in the first instance, and assigns to the state court the task of deciding what the respondent's testimony in another case was worth to the State. *Titlow*, supra, 680 F.3d at 592-93 (in resentencing the respondent the state trial court is to "take[ ] account any concerns that the State might have regarding the loss of [respondent]'s testimony against her aunt").

In addition, the *amici* acknowledge that the plea agreement's effect on the respondent's constitutional rights to the effective assistance of counsel is an assessment independent of state contract law, pursuant to *Ricketts v. Adamson*, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d (1987). However, to the extent state law defines the parties' obligations under the agreement and, as in *Adamson*, those obligations shape the injury to be remedied, state law should be consulted. A requirement of mandatory resentencing would preclude consideration of state law, and thus violate principles of comity.

ARGUMENT

I. Introduction and Background

In *Strickland*, the Court set forth the now familiar test for determining whether a defendant has been denied a Sixth Amendment right to counsel because his attorney was "actually ineffective." *See Id.*, 466 U.S. at 686. He must show that his attorney's performance failed to meet an objectively reasonable standard. If so, he must show that he suffered prejudice as a result.

Lafler and *Frye* were companion cases in which the Court applied *Strickland* to claims that counsel was actually ineffective because his deficient performance led to the imprudent rejection of an executory plea agreement (what the Court referred to as a "lapsed plea"). In those cases, the Court held that, in the lapsed plea context, where counsel's performance failed, prejudice could be shown if a defendant can prove that, but for counsel's error, (1) he would have accepted a plea offer from the prosecution; (2) the prosecution would not have withdrawn the offer at any time up to its embodiment in the Court's judgment; (3) the Court, in fact, would have accepted the terms of the plea agreement and rendered judgment accordingly; and, (4) the agreement's terms represented a "less severe" result than that ultimately received. *Lafler*, supra, 132 S.Ct. at 1385; *Frye*, supra, 132 S.Ct. at 1409. If a defendant is successful in making such a showing, the *Lafler/Frye* remedy calls for the trial court to exercise its discretion in determining whether the defendant "should receive the term of imprisonment the government offered in the plea, the sentence he

received at trial, or something else." *Id.* at 1389. If a defendant is convicted of charges greater than those contemplated by the plea agreement, the proper remedy "may be to require the prosecution to reoffer the plea proposal," after which the court can exercise discretion in deciding whether to vacate the conviction and accept the plea, or leave the conviction intact. *Id.*

In this case, the Sixth Circuit Court of Appeals, applying *Lafler*, expressed concern that this remedial structure "could become illusory if the state court chooses to merely reinstate Titlow's current sentence." *Titlow*, supra, 680 F.3d at 592. The Sixth Circuit thus viewed *Lafler* as requiring the state court to "consult" the initial plea agreement in crafting a new sentence, and mused that further federal review may be afoot if "the state court imposes a sentence greater than the initial plea agreement." *Id.*

Accordingly, the last of the three questions raised in this case, and the one question upon which this brief focuses, asks whether resentencing to "remedy" the constitutional violation is always required in the lapsed plea context. For the reasons that follow, a requirement that a defendant be resentenced in every case is unsound. The Court should therefore answer that question in the negative.

II. *Lafler* Does Not Require Resentencing in Accordance with the Plea Offer

This case differs from *Lafler* and *Frye* in two significant ways. As the Sixth Circuit noted, the

respondent here was convicted of a higher charge than that contemplated in the lapsed plea agreement, and that conviction was supported by the evidence. In addition, the plea bargain here required this respondent to do more than plead guilty and save the State the cost of trial. This respondent was to have testified against Billie – an advantage that the State never received (and cannot now receive). *Titlow*, supra 680 F.3d at 592.

The Sixth Circuit appears to have read *Lafler* as requiring resentencing in accordance with the plea offer – or, at least, using the plea offer as a "baseline" – in order to remedy the constitutional prejudice. It is true that *Lafler* expressed the prejudice in lapsed plea cases as "a conviction on more serious counts or the imposition of a more severe sentence." *Lafler*, supra, 132 S.Ct. at 1386. The Court referred to the "specific injury" suffered in the lapsed plea scenario as the loss of the opportunity for a diminished conviction or sentence. *Id.* at 1389. But the *Lafler* remedy restores a right – not to the particular outcome contemplated by the lapsed plea – to the *proceeding* at which the trial court considers the plea agreement and decides whether it is an appropriate disposition that should become the judgment of the court. Like those cases that restore the right to an appellate proceeding that has been lost due to counsel error, but which do not require a particular outcome from the appellate process, *see Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000), *Lafler* and *Frye* do not require a particular outcome from the plea proceeding.

Instead, *Lafler* and *Frye* permit the trial court to leave wholly intact the conviction or sentence

imposed after trial, even where counsel error caused forfeiture of a more favorable plea disposition. That is so for, likely, many good reasons, and this case illustrates just two.

First, resentencing either in accordance with the plea agreement or using the plea agreement as a "baseline" would be imprudent where doing so unnecessarily infringes upon the legitimate, competing interests in convictions commensurate with the evidence against a defendant, the sentences legislatures have devised for those convictions, and judicial discretion to impose an appropriate sentence within the range of penalties set by the statutes under which convictions arise. Second, a requirement for such resentencing would ignore separation of powers and comity principles in cases like this where, in substance, the trial court would have to require the State to make an entirely new plea offer that it never contemplated in the first instance.

III. Resentencing is Inappropriate Where, As Here, It Would Infringe Unnecessarily Upon Competing Interests in Appropriate Convictions and Sentences

In *Lafler*, the Court reasoned that "any amount of [additional] jail time has Sixth Amendment significance." *Lafler*, supra, 132 S.Ct. at 1386. But, a basic premise of the Court's reasoning was that the sentence at issue there "appear[ed] to be the sentence [the defendant] or others in his position would have received in the ordinary course." *Id.* at 1387. Further, the Court expressly ruled that remedies in the lapsed plea cases should not grant a

windfall to defendants while "unnecessarily infring[ing] on competing interests." *Id.* at 1388 (quoting *United States v. Morrison*, 449 U.S. 361, 364 (1981)).

In cases like this, where the State bargains for more than a mere guilty plea, the convictions or sentences the State contemplates often are not those ordinarily imposed on similarly situated defendants. Instead, they are discounted in light of the *unique* benefits a *particular* defendant can offer in exchange, such as cooperation in investigation, testimony against a co-defendant, and the like. The benefits make the plea agreement passable to prosecutors seeking to globally investigate and resolve more than one case, even if the disposition represents an otherwise unjustified windfall to the individual defendant.

In such circumstances, to hold that the loss of that discount has Sixth Amendment significance would incorporate the defendant's windfall into his constitutional entitlements. Moreover, the State has made a *discounted* offer that may not necessarily fit the evidence and the crime or the defendant's culpability, but nonetheless sought to advance a greater good. The State would thus be deprived of its interests – not only in whatever commodities it sought from the defendant in trading a discount – in an appropriate conviction and fitting sentence that it otherwise would have pursued. Finally, because of the discount factored into the original plea agreement, requiring the trial judge to resentence in accordance with the plea agreement, or to use it as a "baseline," prevents her from exercising the

discretion she normally would exercise toward the goal of reaching an appropriate and just disposition.

This Court and other courts have recognized the legitimacy of these kinds of plea bargains where the State gives to a defendant a discounted conviction or sentence in exchange for more than a mere guilty plea. At times, the prosecuting authority is willing to offer a clement disposition – albeit not one that would normally be viewed as satisfying the goals of the criminal justice system – because a defendant has agreed to cooperate and relinquish certain rights. *See*, e.g., *United States v. Morris*, 633 F.3d 885, 888 (9th Cir. 2011) ("we have repeatedly held that deals conditioned on cooperation are permissible. . . . [And] relinquishment of [ ] rights is an acceptable part of most plea deals."); *Puckett v. United States*, 556 U.S. 129, 131 (2009) (defendant agreed to plead guilty and waive trial, and also to "cooperate with the government by being truthful regarding his participation in criminal activities.").

Sometimes, the government seeks to protect its sources of information, or the information itself, from disclosure, in order to maintain the integrity of its other investigations. It may therefore agree to a disposition that may ordinarily be considered inadequate to address criminal justice objectives as to that defendant, but more universally secures the government's investigative efforts because it includes a stipulation that the government need not disclose information. For example, in *United States v. Ruiz*, 536 U.S. 622 (2002), the agreement acknowledged the duty to turn over information to the defendant regarding her factual innocence, but,

among other things, relieved the government of its obligation to share *information relating to informants or other witnesses*. Ultimately, the Court held that the *Ruiz* defendant's guilty plea was valid nonetheless. Had *Ruiz* arisen in the lapsed plea context, though, it would be unsound to resentence such a defendant to the discounted terms; those terms may not ordinarily have been available to similarly situated defendants where the State did not have the same disclosure concerns.

Other times, the prosecution offers a joint plea deal contingent upon acceptance by each co-defendant, but does not extend an offer for the same terms individually to each defendant. *See*, e.g., *United States v. Rice*, 607 F.3d 133, 144 (5th Cir. 2010) (relying on *Weatherford v. Bursey*, 429 U.S. 545 (1977), reasoning that there is no right to a plea bargain, and holding that defendant "had no right to accept only her portion of the government's offer."). In such a situation, the plea terms may have had less to do with the appropriate disposition of the individual defendant's case than the State's assessment of the costs and associated resource requirements of prosecuting both defendants.[6]

---

[6] This nuance leads to an altogether different *Lafler* question that need not be answered here but which illustrates why required resentencing (or sentencing with the plea offer as a "baseline") is unwise. If such a defendant wished to accept the State's offer, but her co-defendant rejected it, the disposition would not be available to her. Yet, if her co-defendant could show that he rejected the offer because *his* attorney erred in his advice, the co-defendant would be able to recapture the more lenient disposition, while she, having been properly advised, could not. Thus, the two similarly situated defendants would be treated disparately in that only one, ultimately, would enjoy the benefits of the discounted sentence, and the State, having

The Court has also recognized that compromise offers, embodying sentences that may fall short of adequately reflecting culpability, are sometimes made in light of victim concerns about ongoing trauma. *See*, e.g., *Town of Newton v. Rumery*, 480 U.S. 386, 390 (1987) (recognizing prosecution's desire to protect sexual assault victim "from the trauma she would suffer if she were forced to testify" as motive for agreeing to disposition); see also, *Id.* at 403 (Concurring opinion of Justice O'Connor) (victim's "emotional distress," among other things, supported prosecutor's judgment regarding disposition). In this kind of case, the plea offer does not reflect the severity of the crime, but, rather, is acceptable insofar as it at least imposes *some* punishment – it seeks in *some* measure to address the goals of the criminal justice system – while at the same time respecting victim concerns.

In each of these scenarios, the prosecution may offer a sentence that, standing alone, would be inadequate in light of the defendant's crime and the evidence against him. Nonetheless, the prosecution offered a discount to the defendant in consideration of the benefits the State would receive above and beyond the mere avoidance of trial. A requirement to resentence the defendant in accordance with the lapsed plea would grant to him the discounted disposition while divesting the State of the very benefits that made the discount palatable.

In this case, the sentence or conviction the prosecution offered may have been less than

---

nonetheless expended resources on two trials, would have to grant the lapsed plea benefits to the co-defendant.

warranted as to the respondent. Nonetheless, as in other cases, the State may have sought a global resolution and, therefore, the offer extended to this respondent in exchange for her testimony against Billie may have been deemed by the State to be acceptable. *See Lafler*, supra, 132 S.Ct. at 1397 (dissenting opinion of Justice Scalia, in which Justice Thomas and the Chief Justice joined) (acknowledging existence of plea bargaining for the purpose of obtaining testimony against a "greater malefactor."). In *United States v. Springs*, 988 F.2d 746 (7th Cir. 1993), the defendant rejected a plea deal that would have required his assistance, including testifying at trial, in the prosecution of other members of his drug ring. *Id.* at 747. He was later sentenced more harshly, and he claimed ineffective assistance of counsel with respect to his rejection of the more favorable plea deal. The Seventh Circuit reasoned that the harsher sentence was nonetheless one that "the [federal sentencing] guidelines prescribe as appropriate" for the defendant's crime, and that "[t]he prosecutor offered a discount in exchange for Springs' assistance, which was not forthcoming." Relying on the Court's decision in *Mabry v. Johnson*, 467 U.S. 504 (1984), *unrelated dictum disavowed, Puckett*, supra, 120 S.Ct. at 1430 n. 1, the Seventh Circuit concluded that, under the Constitution, "[p]rosecutors need not offer discounts and may withdraw their offers on whim," and, thus, denied the ineffectiveness claim. This case should follow the same course.

Like the federal sentencing guidelines in *Springs*, Michigan's statutory crime definitions and attendant penalties – rather than the original plea offer – should act as the "baseline" in determining

the appropriate outcome of this case. The Court has previously recognized that the State's legislature has the "primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme." *Ewing v. California*, 538 U.S. 11, 28 (2003). Moreover, it must be assumed that, in enacting its penal code, Michigan's legislature properly exercised its discretion and properly considered evidence showing that a particular crime warranted the punishment the legislature devised. *United States v. Des Moines Nav. & Ry. Co.*, 142 U.S. 510, 544 (1892).

Here, the Sixth Circuit acknowledged that the respondent's conduct fit the definition of Second Degree Murder, and there is no evidence in the record of this case from which to conclude (nor does there appear to be a claim) that Michigan's legislature has artificially inflated the punishment attendant to that crime in order to allow room for bargaining down to its true worth. In fact, Michigan's legislature has enacted a complex statutory sentencing scheme expressly recognizing the purposes of punishment. MICH. COMP. LAWS. § 750.1 et seq.

The Court has recognized that the purposes of punishment are to serve the penal goals of retribution, deterrence, incapacitation, and rehabilitation. *See Tapia v. United States*, 131 S.Ct. 2382, 2387 (2011); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). Accordingly, criminal punishments that fit the criminal's conduct and character have generally withstood constitutional challenge. In *Bordenkircher v. Hayes*, supra, 434 U.S. 357, for example, the Court found that there was no due

process violation where the prosecution enhanced charges following a breakdown in plea negotiations. That was so because the defendant was legitimately subject to prosecution for the enhancement based upon his conduct. *Id.* at 364.

The Court has similarly recognized that penal goals should not be defeated merely because the prosecution extended a plea offer that ultimately is determined not to serve those goals. *United States v. Goodwin*, 457 U.S. 368, 372 (1982). In *Goodwin*, the Court reasoned that a prosecutor may uncover additional information or come to realize that the information he has is more significant than originally thought. "[T]he proper extent of prosecution," the Court said, "may not have crystallized" at the plea stage. *Id* at 381. For that reason, "[a]n initial indictment from which the prosecutor embarks on a course of plea negotiation does not necessarily define the extent of the legitimate interest in prosecution." *Id.* at 18.

The same is true in the lapsed plea context when the prosecution has made a discounted offer because it sought some advantage external to the case against the particular defendant to whom the offer was made. The discounted offer may not reflect the State's legitimate interest in prosecution. The State deemed the arrangement acceptable at the plea stage because it anticipated a benefit, which, ultimately, it never received. That plea offer thus should not bind the State to a disposition that does not otherwise serve its interests.

Similarly, the plea offer should not bind the trial judge by requiring him to "consult [it] as a

baseline" in resentencing defendants in the posture of this respondent. The Court's jurisprudence traditionally has recognized the importance of the trial judge's unfettered discretion in incorporating into the judgment a disposition that fits both the offender and his crime. *Oregon v. Ice*, 555 U.S. 160, 163, 171 (2009); *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000); *Williams v. New York*, 337 U.S. 241, 247 (1940); *see also, Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (so long as sentence is within statutory range, "appellate review is at an end.").

In *Ruiz v. United States*, 551 U.S. 338 (2007), the Court, applying the federal sentencing guidelines, reaffirmed the principle that a judge's discretion applied to the statutory penalties enacted by the legislature gives rise to the appropriate outcome in criminal cases. The Court held that the constitution is not offended even if a sentence falls outside the "heartland" to which the guidelines apply if it is warranted by the facts of the case – even where the judge considers factual matters not determined by the jury. *Id.* at 351-52. *Lafler* does not stand as an exception to this principle. Specifically, *Lafler* does not limit the State's legislative enactments, its legitimate prosecutorial interests, or the judge's discretion. The remedy set forth there patently allows a trial judge to leave the conviction, sentence, or both intact. In contrast, the Sixth Circuit's order that the trial court "fashion a sentence . . . that . . . remedies the violation" does impose such limits, and should not be affirmed.

IV. Resentencing is Inappropriate Where, As Here, It Fails to Consider Separation of Powers and Comity Principles

The Remedy set forth in *Lafler* contemplates ordering the prosecution to reoffer the original plea deal. *Lafler*, supra, 132 S.Ct. at 1389 Based upon that, the Sixth Circuit here ordered the State to "reoffer" the original bargain and directed the trial court to adjust the result by whatever value *the court* – not the prosecutor – places on the State's lost benefit ("the state court may then exercise its discretion to fashion a sentence . . . [that] takes into account any concerns the State might have regarding the loss of [the respondent's] testimony [against Billie].").

This case differs from *Lafler*, though, in that, by way of the plea agreement involved here, the State did not enter into negotiations with the avoidance of trial costs as its only goal. The respondent's testimony against Billie – the very thing that the Sixth Circuit acknowledged was the State's *primary* reason for the State's involvement in plea bargaining – is now impossible. Thus, in substance, unlike the remedial measures contemplated in *Lafler*, the Sixth Circuit has not ordered the State to *reoffer* a plea deal, it has ordered the State to offer a plea deal in the first instance – one that the State did not contemplate and which does not include the primary benefit underlying the State's willingness to bargain. The order thus violates separation of powers and comity principles.

The order violates separation of powers principles because prosecutors, not the courts, "are charged

with the duty of prosecuting offenders against the laws of the State, and must decide when and how this is to be done." *Younger v. Harris*, 401 U.S. 37, 45 (1971). The Court has thus acknowledged that:

> Prosecutorial charging decisions are rarely simple. In addition to assessing the strength of and importance of a case, prosecutors also must consider other tangible and intangible factors, such as government enforcement priorities. . . . [T]hey also must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge. Because these decisions are not readily susceptible to the kind of analysis the courts are competent to undertake, we have been properly hesitant to examine the decision whether to prosecute.

Rumery, supra, 480 U.S. at 396 (all quotations, citations and footnotes omitted); *see also*, *Bordenkircher*, supra, 434 U.S. at 364 (charging decisions rest entirely in prosecutor's discretion).

Accordingly, the prosecution here assessed the strength of its cases – both the case against the respondent and the case against Billie – and the importance of each case. The prosecution measured those assessments against its enforcement priorities and resources. Based upon its analyses, the prosecution entered into an agreement that not only saved the State the cost of trial against respondent,

but that procured evidence – the respondent's testimony – in the case against Billie, thus bringing global satisfaction to the State. But for the State's "major benefit" of that respondent's testimony in Billie's case, the prosecution may not have made an offer at all, or it may not have come down off the higher charge. Ordering the State to offer a plea deal to the respondent that removes the benefit of her testimony from the equation supplants the court's judgment for the prosecution's judgment with respect to myriad factors that went into deciding whether to plea bargain in the first place.

Perhaps in recognition of this infringement, and in an effort to ameliorate it, the Sixth Circuit charged the trial court with placing a value on the respondent's testimony in Billie's trial, and adjusting the outcome accordingly. In other words, under the Sixth Circuit's order, the trial court would be justified in, for example, adding additional jail time to the term contemplated by the plea in order to make the state whole for the loss of the testimony against Billie. This, too, would require supplanting the court's assessments for those of the prosecution's with respect to the value to the State of the respondent's testimony. Moreover, it would penalize respondent for something unrelated to her crime. Rather, it would punish her because *Billie* walked free. More succinctly, it would punish her for the crime of another. The order thus cannot be constitutional in any event.

Further, the Sixth Circuit's order ignores principles of comity, because it fails to afford an opportunity to consider the State's and the respondent's obligations under the agreement in

accordance with State law. Although state contract law cannot govern the delivery of constitutional rights, the parties' obligations pursuant to the plea agreement do shape the *scope* of the constitutional injury, and those obligations are matters of state law. *Puckett*, supra, 566 U.S. at 137 ("Although the analogy may not hold in all respects, plea bargains are essentially contracts."); *see also, Adamson*, supra, 483 U.S. at 7 n. 3 (1987) (construction of plea agreement and parties' obligations flowing from it are "within broad bounds of reasonableness," matters of state law).

Under Michigan law, the State would not likely be obligated to grant to the respondent the benefits that would have inured to her if the plea agreement had been executed. That is so for two reasons. First, Michigan has adopted the frustration-of-purpose doctrine. *Rooyakker & Sitz v. Plante & Moran*, 276 Mich. App. 146, 159 (2007). That doctrine states:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language of the circumstances indicate to the contrary.

RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981).

Here, the prosecutor entered into the agreement on the basic assumption that respondent would testify against Billie. That purpose was frustrated by respondent's declination to testify. Michigan courts would thus likely find that the State is discharged of its obligations pursuant to the plea agreement.

The second reason that Michigan law may excuse the State's performance is that courts there would look to the intent and contemplations of the parties at the time the agreement was made. *Landa v. Schmidt*, 362 Mich. 561, 107 N.W. 2d 816 (1961). Unless the State was on notice at the time of the plea agreement that it may have to provide unilateral benefits to the respondent even if it did not receive the benefit of her testimony in Billie's trial, Michigan courts would likely conclude that they "do not have the power to make new contracts between the parties. . ." *Id.* at 567; *Cf.*, *Bissell v. Edison Company*, 9 Mich. App. 276, 156 N.W.2d 623 (1968) (citing 6 Williston, Contracts (Rev. ed.) § 1931) (where "unanticipated circumstance" alters promise contemplated by the parties at the time of contract, "risk should not fairly be thrown upon the promisor."). As in *Landa*, supra, where the condition upon which the agreement was consummated never occurred, "no liability was created" for the State. *Id.* at 569; *see also*, e.g., *Adell Broadcasting v. Apex Media Sales*, 269 Mich. App. 6, 12, 708 N.W.2d 778 (2005) (no enforceable contract unless party consented to modification of contract).

Again, state contract law cannot dictate constitutional rights. However, as in *Adamson*, supra, 483 U.S. at 11, where the Court stated that

"[r]espondent cannot escape the Arizona Supreme Court's interpretation of his obligations under the [plea] agreement," the extent to which the parties' obligations frame the scope of a remedy here depends upon the interpretation of the agreement by Michigan courts. *Lafler's* remedy would give the state trial courts discretion to consider those obligations under Michigan law. The Sixth Circuit's ruling, requiring resentencing, limits that discretion.

In fact, the Court's decision in *Adamson*, supra, 483 U.S. 1, should guide the outcome of this case. There, as in this case, a defendant had agreed to testify against co-defendants in exchange for a reduction in charges. Like the respondent here, the *Adamson* defendant later gave the State an ultimatum – he would only testify if certain additional "demands" were met. *Id.* at 4-5 & n. 2. The State did not acquiesce, and the respondent declined to testify. The trial judge explained to the *Adamson* defendant that a breach would return the parties to the *status quo ante*. *Id.* at 9-10. Nonetheless, the defendant would not live up to his agreement. When the State again charged him with the crime that was extinguished as part of the defunct plea bargain, the *Adamson* defendant cried foul on double jeopardy grounds. The Court rejected the constitutional claim because "[t]he State did not force the breach" and because the defendant was made aware at the plea hearing of the consequences of that breach. *Id.* at 11-12. Here, the State did not cause the lapse in the plea agreement, and the parties were returned to their prior positions following the respondent's declination to testify. Accordingly, this case does not demand the remedy of resentencing.

CONCLUSION

The Sixth Circuit's ruling should be reversed.

Respectfully submitted,

KEVIN T. KANE
Chief State's Attorney
State of Connecticut

MICHAEL J. PROTO
Assistant State's Attorney
Counsel of Record
Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, Connecticut 06067
Counsel for Amici Curiae

June 17, 2013

AMICUS CURIAE BRIEF

No. 12-414

IN THE

Supreme Court of the United States

SHERRY L. BURT, WARDEN,
Petitioner,

v.

VONLEE NICOLE TITLOW,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

WILLIAM H. DEVANEY
ALEXANDRA MEGARIS
VENABLE LLP
1270 Avenue of the Americas
New York, NY 10020
(212) 307-5500

JOHN F. COONEY
Counsel of Record
VENABLE LLP
575 7th Street, N.W.
Washington D.C. 20004
(202) 344-8300
jfcooney@venable.com

Counsel for Amicus Curiae

July 24, 2013

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. Reoffering The Plea Agreement, By Itself, Does Not Neutralize The Taint Of A Sixth Amendment Violation	7
A. This Court Has Long Recognized That Remedies Should Be Tailored To The Injury Suffered From A Constitutional Violation	7
B. Merely Reoffering The Plea Agreement Does Not Remedy A Sixth Amendment Violation If The Trial Court Is Not Obligated To Neutralize The Constitutional Taint By Accepting The Plea Agreement And Resentencing The Defendant Within Its Terms	9
II. The Reasoning Of *Lafler* Requires That The State Reoffer The Original Plea Agreement And That The Trial Court Accept It, And Act Consistently With The Terms Of The Agreement In Resentencing	11

TABLE OF CONTENTS—Continued

Page

A. The Requirement That The Trial Court Exercise Its Discretion On Resentencing Within The Terms Of The Original Plea Agreement Is Implicit In This Court's Definition Of The Sixth Amendment Right In *Lafler* 11

B. The Requirement That The State Trial Court Exercise Its Discretion On Resentencing Within The Terms Of The Original Plea Agreement Does Not Improperly Impinge On That Court's Equitable Discretion 12

CONCLUSION 15

TABLE OF AUTHORITIES

CASES — Page

Gideon v. Wainwright, 372 U.S. 335 (1963).... 3

Glover v. United States, 531 U.S. 198 (2001) 8, 9

Hill v. Lockhart, 474 U.S. 52 (1985)..... 8

Kimmelman v. Morrison, 477 U.S. 365 (1986) 8, 10, 13, 14

Lafler v. Cooper, 132 S. Ct. 1376 (2012).....*passim*

Titlow v. Burt, 680 F.3d 577 (6th Cir. 2012)... 12

United States v. Mechanik, 475 U.S. 66 (1986) 10, 11

United States v. Morrison, 449 U.S. 361 (1981) 8, 9

Wiggins v. Smith, 539 U.S. 510 (2003)..... 8

Williams v. Jones, 571 F.3d 1086 (10th Cir. 2009)..... 11

CONSTITUTION

U.S. Const. amend. VI .....*passim*

OTHER AUTHORITIES

Att. Gen. Eric Holder, Address at the American Council of Chief Defenders Conference (June 24, 2009), *available at* http://www.justice.gov/ag/speeches/2009/agspeech-090624.html..... 5

Editorial, *The Sorry State of Indigent Defense*, WASH. POST, Dec. 9, 2010..... 5

TABLE OF AUTHORITIES—Continued

Page(s)

National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (2009), *available at* www.constitutionproject.org. 4

Steven Zeidman, *Indigent Defense: Caseload Standards*, N.Y. L.J., Mar. 24, 2010, *available at* http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202446663975 5

IN THE

Supreme Court of the United States

No. 12-414

SHERRY L. BURT, WARDEN,
Petitioner,

v.

VONLEE NICOLE TITLOW,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The Constitution Project[1] is an independent, not-for-profit think tank that promotes and defends

[1] No counsel for a party or a party to this proceeding authored this brief in whole or in part, and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than *amicus curiae*, its members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of the Parties' general consent for *amicus curiae* to submit a brief in this proceeding are filed with this publication.

constitutional safeguards and seeks consensus solutions to difficult legal and constitutional issues. It respectfully submits this brief as *amicus curiae* in support of the Respondent, Vonlee Nicole Titlow (Docket No. 12-414).

The Constitution Project achieves its goals through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. It has earned wide-ranging respect for its expertise and reports, which are designed to make constitutional issues a part of ordinary political debate. The Constitution Project frequently appears as *amicus curiae* before this Court, the federal courts of appeals, and the highest state courts, in support of the protection of constitutional rights.

The Constitution Project's National Right to Counsel Committee is a bipartisan committee of independent experts representing all segments of America's justice system.[2] Established in 2004, the National Right to

---

[2] The Committee members are as follows (affiliations listed for identification purposes only): Hon. Rhoda Billings (Co-Chair), Professor Emeritus, Wake Forest Law School; Justice, North Carolina Supreme Court, 1985-1986, Chief Justice, 1986; Judge, State District Court, 1968-1972; Robert M. A. Johnson (Co-Chair), District Attorney, Anoka County, Minnesota; former President, National District Attorneys Association; Hon. Timothy K. Lewis (Co-Chair), Appellate Practice Group, Schnader Harrison Segal & Lewis LLP; Judge, United States Court of Appeals for the Third Circuit, 1992-1999; Judge, United States District Court for the Western District of Pennsylvania, 1991-1992; former Assistant United States Attorney, Western District of Pennsylvania; former Assistant District Attorney, Allegheny County, Pennsylvania; Hon. Walter Mondale (Honorary Co-Chair), Senior Counsel, Dorsey & Whitney LLP; Vice President of the United States, 1977-1981; United States Senator (D-MN), 1964-1977; former Minnesota Attorney General, who organized the *amicus* brief of 22 states in

support of Gideon in *Gideon v. Wainwright*; Hon. William S. Sessions (Honorary Co-Chair), Partner, Holland and Knight LLP; Director, Federal Bureau of Investigation, 1987-1993; Judge, United States District Court for the Western District of Texas, 1974-1987, Chief Judge, 1980-1987; United States Attorney, Western District of Texas, 1971-1974; Shawn Marie Armbrust, Executive Director, Mid-Atlantic Innocence Project; former Northwestern journalism student who helped exonerate death row inmate Anthony Porter; Hon. Jay W. Burnett, Former Judge, 351st Criminal District Court, Harris County, Texas, appointed 1984; Judge, 183rd Criminal District Court, Harris County, Texas, 1986-1998; Visiting Criminal District Judge, 2nd Judicial Administrative Region of Texas, 1999-2000; Alan Crotzer, Senior Clerk, Department of Juvenile Justice; 2006 DNA exonoree; Dr. Tony Fabelo, Director of Research, Justice Center of the Council of State Governments; former Senior Associate, The JFA Institute; former Executive Director, Texas Criminal Justice Policy Council; Hon. Norman S. Fletcher, Of Counsel, Brinson, Askew, Berry, Seigler, Richardson & Davis; Justice, Supreme Court of Georgia, 1989-2005, Chief Justice, 2001-2005; Monroe H. Freedman, Professor of Law and Former Dean, Hofstra University School of Law; Susan Herman, Associate Professor of Criminal Justice, Pace University; former Executive Director, National Center for Victims of Crime; Bruce R. Jacob, Dean Emeritus and Professor of Law, Stetson University College of Law; former Assistant Attorney General for the State of Florida, represented Florida in *Gideon v. Wainwright*; Abe Krash, Retired Partner, Arnold & Porter LLP; former Visiting Lecturer, Yale Law School; Adjunct Professor, the Georgetown University Law Center; represented Clarence Gideon in *Gideon v. Wainwright*; Charles J. Ogletree, Jr., Founding and Executive Director, Jesse Climenko Professor of Law, Charles Hamilton Houston Institute for Race and Justice, Harvard Law School; Bryan Stevenson, Director, Equal Justice Initiative of Alabama; Professor of Law, New York University School of Law; Larry D. Thompson, General Counsel, PepsiCo, Inc.; Deputy Attorney General of the United States, 2001-2003; former United States Attorney, Northern District of Georgia; Hubert Williams, President, Police Foundation; former New Jersey Police Director; former Special Advisor to the Los Angeles Police Commission; Norman Lefstein (Reporter and

Counsel Committee's mission was to examine, across the country, whether criminal defendants and juveniles charged with delinquency who are unable to retain their own lawyers receive adequate legal representation, consistent with the United States Constitution, decisions of this Court, and the ethical rules of the legal profession.

The National Right to Counsel Committee spent several years examining the ability of state courts to provide adequate counsel to indigent individuals charged in criminal and juvenile delinquency cases. In 2009, the Committee issued its report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, which included the Committee's findings on the vindication of the right to counsel nationwide. Based on those findings, the Committee made twenty-two substantive recommendations for reform.[3] The Committee recommended that states provide sufficient funding and oversight to comply with constitutional requirements and endorsed litigation seeking prospective relief on behalf of a class of indigent defendants when states failed to comply with those requirements. *See id.* at 183-200, 210-13. The Committee also made recommendations for the federal government, criminal justice agencies, bar associations, judges, prosecutors, and defense lawyers to address the indigent defense crisis facing the nation. *See id.* at 200-09. *Justice Denied* has been cited in a wide

---

Member), Professor of Law and Dean Emeritus, Indiana University School of Law, Indianapolis; Robert Spangenberg (Reporter), President, The Spangenberg Group.

[3] *Justice Denied* is available on The Constitution Project's website, www.constitutionproject.org. Specific web addresses are provided in the table of authorities.

variety of national news outlets, state newspapers, and state court opinions, and publicly praised by a wide array of public figures. *See, e.g.*, Editorial, *The Sorry State of Indigent Defense*, WASH. POST, Dec. 9, 2010; Steven Zeidman, *Indigent Defense: Caseload Standards*, N.Y. L.J., Mar. 24, 2010, *available at* http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202446663975; Attorney General Eric Holder, Address at the American Council of Chief Defenders Conference (June 24, 2009), *available at* http://www.justice.gov/ag/speeches/2009/agspeech-090624.html.

Accordingly, The Constitution Project has an interest as *amicus curiae* in this important case regarding the Sixth Amendment right to counsel currently pending before the Court.

SUMMARY OF ARGUMENT

This brief addresses the third question presented, which asks whether *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), requires state trial courts to resentence a defendant who was prejudiced by the ineffective assistance of counsel in rejecting her plea agreement, and to do so in such a way as to remedy the Sixth Amendment violation suffered. It does. The Court therefore should affirm the decision of the Sixth Circuit.

Where, as here, a defendant is convicted of a more severe offense than that offered in a lapsed plea agreement and ultimately receives a sentence that is significantly longer than the sentence contemplated in the original plea agreement, then the appropriate remedy is for the State to reoffer the plea agreement, and assuming the defendant accepts the original plea agreement, for the state trial court to vacate the conviction, accept a plea pursuant to the original

agreement, and resentence the defendant consistent with the terms of the original plea agreement. While the "state court's discretion is not entirely unfettered," as the Sixth Circuit explained, the court still may exercise its discretion within the confines of the reinstated plea agreement. As such, in the present case, once the State reoffers Respondent the original plea agreement, the state court should vacate the second-degree murder charge if the defendant accepts the agreement. As contemplated by the original plea agreement, the court should enter a guilty plea on the manslaughter charge, and exercise its discretion to resentence Respondent to a term of imprisonment within the range of 7 to 15 years, based on the court's assessment of the applicable sentencing factors.

As this Court definitively established in *Lafler*, plea negotiations are a critical step in the criminal adjudicatory process, and the Respondent has a Sixth Amendment right to effective assistance of counsel during this stage. This is a fundamental right, and any remedy must put Respondent as close as possible to the position she would have occupied but for the constitutional violation.

Petitioner claims that the violation is remedied by the prosecutor simply reoffering the plea agreement. Pet. Br. at 47. However, absent some remedial obligation on the part of the trial court to accept a plea to the charge or charges offered in that agreement and to sentence the Respondent within its parameters, the adverse effect of the Sixth Amendment violation is not neutralized. While it may not be possible to restore the *status quo* in all cases, requiring the trial judge to accept a plea to the offense or offenses in the reoffered plea agreement and to resentence the Respondent within its confines is the remedy that

most cures the constitutional violation. This requirement most closely preserves the sentencing discretion of the trial court within the range permitted by the governing state law and the original plea agreement.

ARGUMENT

I. Reoffering The Plea Agreement, By Itself, Does Not Neutralize The Taint Of A Sixth Amendment Violation.

Petitioner claims that there is no obligation on the part of the state trial court to remedy the Sixth Amendment violation, and that the prosecution's reoffering of the plea agreement alone is sufficient to cure the constitutional violation. Pet. Br. at 47. Absent some obligation on the trial court to accept the plea and resentence the Respondent in line with the reoffered plea agreement, however, Respondent's Sixth Amendment right to effective assistance of counsel would be illusory. First, Respondent's constitutional rights have been violated, and the remedy must neutralize the taint of that violation. Second, simply reoffering the plea agreement would not neutralize the taint. There is an affirmative duty on the part of the trial court to redress the constitutional violation by accepting the plea and sentencing the Respondent pursuant to the terms of the original plea agreement.

A. This Court Has Long Recognized That Remedies Should Be Tailored To The Injury Suffered From A Constitutional Violation.

"Sixth Amendment remedies should be 'tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing

interests.'" *Lafler*, 132 S. Ct. at 1388 (quoting *United States v. Morrison*, 449 U.S. 361, 364 (1981)). Injuries resulting from the ineffective assistance of counsel can come in a number of forms, including the introduction of evidence due to counsel's ignorant failure to move to suppress, *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986), the failure to introduce mitigating evidence due to counsel's insufficient investigation, *Wiggins v. Smith*, 539 U.S. 510, 535-36 (2003), the failure to object to or argue against a mistake of law on the part of the prosecution, *Glover v. United States*, 531 U.S. 198, 200 (2001), and the acceptance or non-acceptance of a guilty plea due to deficient advice from counsel, *Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985); *Lafler*, 132 S. Ct. at 1384-85.

In *Lafler*, this Court considered the injuries that can result from ineffective assistance during the plea bargaining stage, distinguishing those cases where a defendant would have received a less severe *sentence* from those where the defendant would have been convicted of a less severe *charge*. 132 S. Ct. at 1389. In the latter case, this Court held that because simply resentencing could not fully redress the constitutional injury, the proper remedy is for the prosecution to reoffer the plea agreement, and for the trial court to "exercise its discretion in determining whether to vacate the convictions, to vacate only some of the convictions and resentence [R]espondent accordingly, or to leave the convictions and sentence from trial undisturbed." *Id.* at 1391. In exercising this discretion, however, the trial court must adopt a remedy that neutralizes the taint of the constitutional violation. *Id.* at 1389.

B. Merely Reoffering The Plea Agreement Does Not Remedy A Sixth Amendment Violation If The Trial Court Is Not Obligated To Neutralize The Constitutional Taint By Accepting The Plea Agreement And Resentencing The Defendant Within Its Terms.

Petitioner asserts that the only required remedy for Respondent's injury is a reoffered plea agreement. Pet. Br. at 47. But Sixth Amendment remedies must put defendants in the position they would have occupied but for the ineffective assistance of counsel. *See United States v. Morrison*, 449 U.S. at 365. Petitioner's proposed "remedy" would do no such thing. After going through the steps of reoffering the plea agreement, Petitioner argues, the remedy for the constitutional violation would be complete, regardless of whether the trial court accepted the charge in the reoffered plea agreement, vacated the conviction, or declined to resentence the Respondent. In other words, even where a defendant's constitutional right was violated and she was prejudiced by the violation, the putative "remedy" could leave her in exactly the same position as if she had not prevailed on her ineffective assistance claim. That is not a remedy. As Justice Scalia noted in his dissent in *Lafler*, "I find it extraordinary . . . that the remedy could ever include no remedy at all." 132 S. Ct. at 1397 (Scalia, J., dissenting); *see also Glover v. United States*, 531 U.S. 198, 203 (2001) ("[O]ur jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.").

Petitioner and its supporting *amici* correctly note that the *status quo* cannot be fully restored in this case because the condition in the plea agreement that

would have required the Respondent to testify against her uncle's wife, who stood accused of first degree murder, can no longer be satisfied. Pet. Br. at 49; Br. of the United States as *Amicus Curiae* at 25-30; Br. of Conn. and 34 Other States as *Amici Curiae* at 12-16. Seeking to distinguish this case from *Lafler*, they argue that because the defendant here failed to testify, the State lost what it bargained for and that Respondent should therefore be denied any meaningful relief.

Focusing on the costs borne by the State and balancing those costs against a defendant's constitutional rights, however, contorts the nature of a Sixth Amendment remedy. While a remedy should not grant a defendant a windfall nor needlessly squander the State's resources, it nevertheless must neutralize the taint of the violation. *Lafler*, 132 S. Ct. at 1388. As this Court made clear in *Kimmelman*, "the Constitution constrains our ability to allocate as we see fit the costs of ineffective assistance. The Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel." 477 U.S. at 379.

If Respondent is left with a conviction on a greater charge, additional charges, or receives a longer term of imprisonment than she could have received had she accepted the plea agreement, the constitutional taint is still present, and the remedy has failed. Any consideration of the adverse effects on the State is subsidiary to the harm suffered by the Respondent, and should be undertaken only after a remedy has been established that redresses the injury suffered. Even in *Lafler*, the State bore substantial costs associated with trying the defendant. 132 S. Ct. at 1388 (quoting *United States v. Mechanik*, 475 U.S.

66, 72 (1986)) ("the reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences"). Nevertheless, the Court ordered that the trial court redress the defendant's constitutional injury.

As the Tenth Circuit reasoned in *Williams v. Jones*, 571 F.3d 1086, 1093 (10th Cir. 2009), "[i]n the end, no remedy may restore completely the parties' original positions," but the remedy adopted must come the closest to restoring the original positions. Here, vacating the conviction, accepting the original plea offer, and resentencing Respondent in accordance with the terms of the original plea offer is the only remedy that comes as close as possible to redressing the constitutional harm.

II. The Reasoning Of *Lafler* Requires That The State Reoffer The Original Plea Agreement And That The Trial Court Accept It, And Act Consistently With The Terms Of The Agreement In Resentencing.

A. The Requirement That The Trial Court Exercise Its Discretion On Resentencing Within The Terms Of The Original Plea Agreement Is Implicit In This Court's Definition Of The Sixth Amendment Right In *Lafler*.

In *Lafler*, where the defendant was convicted of a greater offense than that set forth in the plea agreement, the Court explicitly stated that "it may be that *resentencing alone* will not be full redress for the constitutional injury." 132 S. Ct. at 1389 (emphasis

added). As such, Petitioner's claim that the Sixth Circuit cannot order the trial court to resentence is illogical; in *Lafler*, the Court acknowledged that *resentencing alone may not even be enough*. In other words, *Lafler* contemplated that in many circumstances, a sufficient remedy would entail, at a minimum, resentencing.

Further, in establishing the contours of the right to effective assistance of counsel where a plea agreement is not accepted and in discussing the principles that govern the proper exercise of the trial court's discretion in considering the reoffered and accepted plea agreement, the Court in *Lafler* explained that the plea agreement can be consulted as a "baseline . . . in finding a remedy." 132 S. Ct. at 1390. If the baseline of the remedy can be or is the plea agreement, then a mere reoffer would not provide Respondent with sufficient relief; rather, it is only logical that the trial court be required to resentence according to the terms of the plea agreement.

B. The Requirement That The State Trial Court Exercise Its Discretion On Resentencing Within The Terms Of The Original Plea Agreement Does Not Improperly Impinge On That Court's Equitable Discretion.

As the Sixth Circuit correctly noted, the state court's sentencing discretion is not entirely unfettered. *Titlow v. Burt*, 680 F.3d 577, 592 (6th Cir. 2012). Contrary to Petitioner's position, however, this narrow limitation on the state court's discretion is entirely appropriate, where, as here, the mere reoffer of the plea agreement would result in no remedy for

the constitutional violation. Moreover, the state court still maintains significant sentencing discretion even if it is required to resentence the Respondent within the terms of the original plea agreement.[4]

Petitioner draws on Michigan court rules and precedent to argue that this Court should avoid causing the "loss of judicial autonomy in sentencing" when crafting a remedy. Pet. Br. at 47-48. In so arguing, however, Petitioner fails to consider this Court's precedent that "the Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel." *Kimmelman*, 477 U.S. at 379. While Petitioner is concerned with imposing limitations on state court autonomy, "the Constitution constrains our ability to allocate as we see fit the costs of ineffective assistance." *Id.* at 379. There are competing state and federal interests to be taken into account, and Respondent is not entitled to a "windfall." But to whatever extent the state trial court's interests are harmed, the State, rather than Respondent, must bear that harm.

The very wording of this Court's opinion in *Lafler* further undermines Petitioner's assertion. In discussing the implementation of its remedy, the Court held

---

[4] We concede that there may be instances where a sentence within the terms of the plea agreement might not result in a sentence lower than the Respondent's current sentence. For example, if the plea agreement offered a charge that carried no statutory maximum, or a penalty range into which the Respondent's current sentence fell, the trial court in accepting the plea and taking all appropriate factors into consideration at resentencing may still sentence a defendant to the same term of imprisonment as he received on his original conviction. We take no position on whether such an outcome would be an appropriate constitutional remedy.

that "the trial court must weigh various factors . . . principles elaborated over time in decisions of state and federal courts . . . will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge's discretion." *Lafler*, 132 S. Ct. at 1389. The relevance of this passage is twofold. First, although the Court declined to define the boundaries of proper sentencing discretion, it acknowledged that there are yet-to-be-defined factors that will guide the trial court's discretion in crafting a remedy. Second, the Court referred to decisions of federal courts, in addition to state courts, in bearing upon the trial court's discretion. Therefore, to whatever extent, if any, the Sixth Circuit would limit the discretion of the state trial court, this effect was contemplated in *Lafler*.

Petitioner makes much of the circumstances that can change after a plea agreement is rejected. It is indeed true that new information about a defendant's culpability may come to light after the offer is rejected, or that judicial resources may have been expended, or that the prosecution may lose what it otherwise bargained for in a plea agreement after a trial is completed. But in so arguing, Petitioner ignores this Court's Sixth Amendment jurisprudence and misreads the Sixth Circuit's opinion. *See* Pet. Br. at 50.

It is well settled that Sixth Amendment rights are granted to the innocent and guilty alike, so a defendant's culpability should have no bearing on the remedy. *Kimmelman*, 477 U.S. at 380. Similarly unavailing is the contention that a defendant should be denied relief where the rejection of the plea offer resulted in a substantial expenditure of resources. Pet. Br. at 50; Br. of United States as *Amicus Curiae*

at 26-27. As discussed above, the *State*, rather than the criminal defendant, bears the risk of a constitutional violation. Further, a rejected plea agreement necessarily leads to an expenditure of resources. Petitioner's logic, therefore, would deny relief to any defendant who rejected a plea offer and went to trial, making the right to effective assistance of counsel at the plea bargaining stage non-existent.

Additionally, Petitioner's concern misconstrues the Sixth Circuit's opinion. It did not order the trial court to disregard the prosecution's lost benefit. The court expressly acknowledged that resentencing based on the terms of the plea agreement may not restore the prosecution to the position it occupied before the plea offer was rejected, nor necessarily would it restore the Respondent to that position. Nevertheless, the trial court must resentence the Respondent within the confines of the reinstated plea agreement. The trial court should consider all of the facts and applicable sentencing factors to determine the length of the new sentence. Assuming, *arguendo*, that the Respondent's failure to testify should be reflected in the remedy, the trial court may take that into consideration, while also remedying the denial of Respondent's Sixth Amendment rights.

CONCLUSION

Where, as a result of ineffective assistance of counsel, a defendant is convicted of a more severe charge than that offered in a lapsed plea agreement and receives a sentence that is significantly longer than the sentence contemplated in the original plea, then the appropriate remedy is for the state trial court to vacate the conviction from trial, accept the plea on the charge specified in the plea agreement,

enter a plea of guilty pursuant to the terms of the proffered plea agreement, and resentence the defendant consistent with the terms of the plea. Simply requiring the State to reoffer the plea, absent some obligation on the trial court to accept the plea agreement and to sentence within the range set forth therein, does not vindicate Respondent's Sixth Amendment guarantee to effective assistance of counsel.

The Sixth Circuit's ruling should be affirmed.

Respectfully submitted,

WILLIAM H. DEVANEY
ALEXANDRA MEGARIS
VENABLE LLP
1270 Avenue of the Americas
New York, NY 10020
(212) 307-5500

JOHN F. COONEY
Counsel of Record
VENABLE LLP
575 7th Street, N.W.
Washington D.C. 20004
(202) 344-8300
jfcooney@venable.com

Counsel for Amicus Curiae

July 24, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-414

In The
Supreme Court of the United States

SHERRY L. BURT, WARDEN,
Petitioner,

v.

VONLEE NICOLE TITLOW,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE ETHICS BUREAU AT YALE IN SUPPORT OF RESPONDENT

Lawrence J. Fox
Counsel of Record
DRINKER BIDDLE & REATH LLP
One Logan Square, Suite 2000
Philadelphia, Pennsylvania 19103
(215) 988-2700
lawrence.fox@dbr.com

Counsel for Amicus Curiae *Dated: July 24, 2013*

THE LEX GROUP[DC] • 1825 K Street, N.W. • Suite 103 • Washington, D.C. 20006
(202) 955-0001 • (800) 856-4419 • Fax: (202) 955-0022 • www.thelexgroup.com

Library of Congress
Law Library

Question Presented

Whether a state court judgment denying defendant relief should be entitled to deference when the state court decision condones counsel's failure to conduct any investigation or render any legal advice—lapses that violate his fiduciary duties of competence, communication and loyalty, and which clearly demonstrate the effects of the conflict of interest created by the lawyer's acquisition of media rights.

Table of Contents

Page

Question Presented i

Table of Contents ii

Table of Authorities iv

Interest of *Amicus Curiae* Ethics Bureau at Yale 1

Statement of Facts 2

Summary of Argument 5

Argument 5

I. Ms. Titlow's Lawyer Failed to Perform with Minimal Competence by Violating Basic Duties under the Rules of Professional Conduct 8

A. Ms. Titlow's Lawyer Violated His Duty to Investigate 8

B. Having Conducted no Investigation, Titlow's Counsel Failed in His Duty to Offer Informed Opinion 12

II. Ms. Titlow's Counsel Was Burdened with a Non-Waivable Conflict of Interest 16

III. Petitioner's Excuses for Mr. Toca's Misconduct Are Without Merit 20

A. The Lawyer Must Investigate even if the Client Claims Innocence 20

B. The Client Has the Authority to Decide to Plead Guilty, but the Lawyer Has the Duty to Advise the Client in Making this Decision 27

C. Predecessor Lawyer did not Absolve Substitute Lawyer of Ethical Responsibility 29

D. Time Constraints did not Prevent Ms. Titlow's Lawyer from Investigating or Providing Counseling 32

Conclusion 35

Table of Authorities

Page(s)

Cases

Alvernaz v. Ratelle,
831 F. Supp. 790 (S.D. Cal. 1993) 26

Beckham v. Wainwright,
639 F.2d 262 (5th Cir. 1981) 14, 15

Blanco v. Singletary,
943 F.2d 1477 (11th Cir. 1991) 23

Brady v. Maryland,
373 U.S. 83 (1963) 34

Cincinnati Bar Ass'n v. Emerson,
909 N.E.2d 635 (Ohio 2009) 10

Colvin v. Warden, State Prison,
No. CV094002812,
2012 WL 4465845 (S. Ct. 2012) 29-30

Foster v. Dugger,
823 F.2d 402 (11th Cir. 1987) 8, 29

Harrison v. Mississippi Bar,
637 So. 2d 204 (Miss. 1994) 19

Holloway v. Arkansas,
435 U.S. 475 (1978) 16

In re Alvernaz,
2 Cal. 4th 924 (1992) 14

In re Kepple,
M.R. No. 12026 (3/23/96) 19

In re Seare,
2013 WL 2321664 (Bankr. D. Nev. 2013) 33

In the Matter of Mekler,
669 A.2d 655 (Del. 1995) 10

Johnson v. Zerbst,
304 U.S. 458 (1938) 29

Kimmelman v. Morrison,
477 U.S. 365 (1986) 8

Lewandowski v. Makel,
754 F. Supp. 1142 (W.D. Mich. 1990) 28

Lewandowski v. Makel,
949 F.2d 884 (6th Cir. 1991) 32

Libretti v. United States,
516 U.S. 29 (1995) 27

Lyles v. State,
382 N.E.2d 991 (Ind. Ct. App. 1978) 15

Missouri v. Frye,
132 S. Ct. 1399 (2012) 9, 11

Nostrame v. Santiago,
61 A.3d 893 (N.J. 2013) 31

Padilla v. Kentucky,
559 U.S. 356 (2010) 27

Pennsylvania v. Napper,
385 A.2d 521 (P.A. 1978) 28

People v. Bonin,
765 P.2d 460 (Cal. 1989) 17

People v. Collazo,
11 Misc. 3d 1052(A) (N.Y. 2006) 21, 25

People v. Corona,
80 Cal. App. 3d 684,
145 Cal. Rptr. 894 (1978) 17, 19

People v. Gacy,
530 N.E.2d 1340 (Ill. 1988) 17

People v. Lewandowski,
436 N.W.2d 660 (1989) 14

People v. Maguire,
67 Cal. App. 4th 1022 (1998) 28

People v. Pollard,
282 Cal. Rptr. 588 (Cal. App. 1991) 28

People v. Wilkins,
141 N.W.2d 664 (1966) 21, 23

Ray v. Rose,
535 F.2d 966 (6th Cir. 1976) 17

Rompilla v. Beard,
545 U.S. 374 (2005) 9, 23

Sanders v. Ratelle,
21 F.3d 1446 (9th Cir. 1994) 8, 29

Santobello v. New York,
404 U.S. 257 (1971) 11

Sims v. Livesay,
970 F.2d 1575 (6th Cir. 1992) 23

State v. Barnett,
No. 0311017379,
2006 WL 3308211 (Del. Super. 2012) 22, 26

State v. Crow,
730 N.W.2d 272 (Minn. 2007) 22

State v. Woods,
A06-1483,
2007 WL 2472331 (Minn. Ct. App. 2007) 22

Titlow v. Burt,
680 F.3d 577 (6th Cir. 2012) 2, 12

Toro v. Fairman,
940 F.2d 1065 (7th Cir. 1991) 15

Turner v. Tennessee,
664 F. Supp. 1113 (M.D. Tenn. 1987), *aff'd*,
58 F.2d 1201 (6th Cir. 1988), *cert. granted*,
vacated sub nom. Tennessee v. Turner,
4922 U.S. 902 (1989), *vacated*,
883 F.2d 38 (6th Cir. 1989), *and aff'd*,
940 F.2d 1000 (6th Cir. 1991) 11, 15, 24

United States v. Andrews,
532 F.3d 900 (D.C. Cir. 2008) 34

United States v. Aviles-Colon,
536 F.3d 1 (1st Cir. 2008)..... 34

United States v. Hearst,
638 F.2d 1190 (9th Cir. 1980) 17

United States v. Osorio,
7 F.3d 236 (6th Cir. 1993) 22, 25

United States v. Osorio,
929 F.2d 753 (1st Cir. 1991)..... 34

United States v. Soto-Lopez,
475 F. App'x 144 (9th Cir. 2012)..... 19, 30

United States v. Villar,
416 F. Supp. 887 (S.D.N.Y. 1976) 14

Von Moltke v. Gillies,
332 U.S. 708 (1948) 13-14, 16

Walker v. Caldwell,
476 F.2d 213 (5th Cir. 1973) 14

Wharton v. Jones,
282 S.E.2d 310 (1981) 10

Constitutional Provision

U.S. CONST. amend VI 13, 15

Rules

Mich. R. Prof'l Conduct 1.0(e) 33

Mich. R. Prof'l Conduct 1.1 9

Mich. R. Prof'l Conduct 1.2 ..... 27, 28, 33

Mich. R. Prof'l Conduct 1.2(a) 13, 27

Mich. R. Prof'l Conduct 1.2(b) 33

Mich. R. Prof'l Conduct 1.3 9

Mich. R. Prof'l Conduct 1.8 ..... 17, 18

Mich. R. Prof'l Conduct 1.8(c) 19

Mich. R. Prof'l Conduct 1.16(d) 11

Mich. R. Prof'l Conduct 2.1 13

Mich. R. Prof'l Conduct 7.3 ..... 31, 32

Mich. R. Prof'l Conduct 7.3(a) 31

Mich. R. Prof'l Conduct 37.2 1

Other Authorities

1 Amsterdam, Segal & Miller, *Trial Manual for the Defense of Criminal Cases*, 2-143 (1967) 11, 28

1 Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, *The Law of Lawyering*, § 12.10 at 12-28 (3d ed. 2004 Supp.) 17

ABA Standards for Criminal Justice: Defense Function, Standard 4-3.4 (3d ed. 1993) 17

Abbe Smith, *The Lawyer's Conscience and the Limits of Persuasion*, 36 Hofstra L. Rev. 479 (2007) 29

Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L.J. 1179 (1975) 21, 24

Criminal Justice Prosecution Function and Defense Function Standards 4-4.1 cmt. 21, 23

D.C. Bar Legal Ethics Comm., Op. 334 (2006) 19

EC 5-24; Restatement (Third) of the Law Governing Lawyers § 36(3) 18

Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 Hofstra L. Rev. 1181 (2003) 11

Margaret Raymond, *The Problem with Innocence*, 49 Clev. St. L. Rev. 449 (2001)..... 21

Ohio Board of Comm'rs on Grievances and Discipline, Adv. Op. 90-21, 1990 WL 640516 (1990)..... 31

Restatement (Third) of the Law Governing Lawyers § 36 (2000)..... 17, 18

Robert Mostettler, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 Santa Clara L. Rev. 1, 37, 41 (2010)..... 21

Interest of *Amicus Curiae* Ethics Bureau at Yale[1]

The Ethics Bureau at Yale—a group of thirteen law school students supervised by an experienced practicing lawyer/lecturer—provides professional responsibility advice to not-for-profit legal services providers, drafts amicus briefs in cases concerning professional responsibility, and assists defense counsel with ineffective assistance of counsel issues relating to professional responsibility matters.

The Ethics Bureau at Yale respectfully submits this brief as *amicus curiae* because of its abiding interest 1) in promoting full recognition of the rules of professional conduct in the federal courts as one critical measure of whether criminal defense counsel is effective; and 2) in ensuring that the Sixth Amendment right to the effective assistance of counsel protects every defendant's entitlement to competent, diligent and unconflicted representation at every critical stage of a criminal proceeding.

The failure to remediate lawyers' violations of these ethical standards not only damages the integrity of the trial at issue, but also undermines the fairness and legitimacy of the broader legal system.

---

[1] Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The letters granting consent are filed herewith. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and their counsel has made a monetary contribution to its preparation and submission.

Statement of Facts

In January 2001, Vonlee Titlow was arrested and charged with the first-degree premeditated murder of her uncle, Donald Rogers. That charge carried a mandatory life sentence without parole in the state of Michigan. Resp't's Br. 3.

The evidence against Ms. Titlow was overwhelming. Ms. Titlow's first lawyer, Richard Lustig, negotiated a favorable plea agreement for a 7-to-15-year sentence on Ms. Titlow's behalf. At a plea hearing in October of 2001, Ms. Titlow pled guilty, and the state trial court accepted the plea and scheduled a sentencing hearing. *Id.*

While Ms. Titlow was confined at a facility awaiting her sentencing hearing, however, she was approached by Sheriff's Deputy Eric Ott. Though Ms. Titlow never claimed innocence to him or anyone else, Mr. Ott convinced her that if she was innocent, she should hire another lawyer. Pierson Aff. 3a. Specifically, he referred her to his own lawyer, who in turn recommended she speak with Frederick Toca. *Id.* at 4a. Mr. Ott would later be suspended without pay for his interference in Ms. Titlow's case. J.A. 298.

Mr. Toca and his firm sought to represent Ms. Titlow in exchange for jewelry and the media rights to her case. *Titlow v. Burt*, 680 F.3d 577, 583 (6th Cir. 2012); Pierson Aff. 4a. Ms. Titlow agreed that Mr. Toca and his firm should "sell her story and/or do any and all interview, publicity, etc., related to this matter in order to help derive $100,000 [a

handwritten initialized notation says 80,000] which would serve as trial fee." Mr. Toca's improper acquisition of media rights would later be an aggravating factor contributing to his disbarment. J.A. 312.

Just days after replacing Mr. Lustig as Ms. Titlow's lawyer, Mr. Toca filed a motion to withdraw Ms. Titlow's guilty plea. 680 F.3d at 584. The evidence presented before the Michigan Court of Appeals, in the opinion of the Sixth Circuit, revealed that "Toca did not obtain Titlow's file, inspect the government's discovery materials, or speak with Lustig (Titlow's former counsel) about the case until January 10, 2002, approximately a month and a half *after* the plea-withdrawal hearing." *Id.* Lustig swore under oath that "Mr. Toca did not pick up the discovery materials from [Mr. Lustig's] office, nor discuss the facts of the case with [him] until January 10, 2002" although the "file was made available to him on or about November 29, 2001"—a statement that is corroborated by the Acknowledgement of Receipt signed by Mr. Toca. Lustig Aff. 6a-6.5a.

Before moving to withdraw Ms. Titlow's guilty plea, Mr. Toca did not ask for an extension so he would have time to review these files, despite complaining "he had been 'retained last week' and that there was 'a lot of material' he still needed to review prior to Titlow's trial." *Id.* Furthermore, there is no evidence that Mr. Toca ever discussed with Ms. Titlow the elements necessary for a conviction or the sentences she might face if she went to trial. 680 F.3d at 590.

After requesting that the court delay the trial, Mr. Toca moved to withdraw as counsel less than one month before the trial was set to start. He cited a breakdown in communication and "some other issues." As it turned out, those other issues were financial: the book deal for the case had fallen through, and Mr. Toca had taken on Ms. Titlow's case knowing that he could not seek appointment by the court if Ms. Titlow were unable to compensate him. Resp't's Br. 8. All in all, Mr. Toca stepped in only to withdraw Ms. Titlow's guilty plea, a step he took having conducted no research. After rebuking Mr. Toca, the court appointed another lawyer to represent Ms. Titlow.

The case proceeded to trial in March 2002. The jury convicted Ms. Titlow of second-degree murder, and the court sentenced her to 20 to 40 years in prison, 680 F.3d at 584, nearly three times the punishment she was offered under the plea agreement negotiated by her first lawyer. *Id.* at 591.

Ms. Titlow claimed that Mr. Toca had been ineffective in permitting her to withdraw her manslaughter plea. The Michigan Court of Appeals rejected her claim; the Michigan Supreme Court denied leave to appeal. App. to Pet. 120a. In federal habeas proceedings, the district court ruled that Ms. Titlow had failed to establish the deficient-performance prong of her ineffective-assistance claim. 680 F.3d at 577. The Sixth Circuit reversed, noting that the court below had not considered substantial evidence that Ms. Titlow would not have withdrawn her initial plea if not for her lawyer's "clearly deficient" performance. *Id.* at 591. The court

directed the State to reinstate the original plea agreement and ordered the trial court to fashion an appropriate sentence remedying the violation of Ms. Titlow's right to effective assistance. *Id.* at 592.

Summary of Argument

Operating under a demonstrably prejudicial non-waivable conflict of interest and without conducting any investigation, substitute counsel withdrew the client's guilty plea and then effectively abandoned the client. Under these circumstances, deferring to the Michigan Supreme Court's finding that Ms. Titlow's counsel was barely effective would transform the doctrine of deference into one of abject capitulation. Moreover, failing to set aside Ms. Titlow's conviction would undermine the standards for effective assistance of counsel in criminal cases involving substitution of counsel and would ignore the serious public policy principles underlying the absolute bar on accepting media rights as compensation for representation.

Argument

This Court is engaged in a quest to give meaning to the constitutional mandate that the accused receive effective assistance of counsel. In the view of *amicus*, effective assistance of counsel demands compliance with the applicable rules of professional conduct, which provide a critical touchstone for resolving the particular issues raised in this case.

The rules are not simply lawyer obligations promulgated by the American Law Institute or the

American Bar Association, as important and standard-setting as their efforts should be. These rules have been adopted by state and federal courts as minimum legal requirements for lawyer conduct. Their infringement can and should result in possible disbarment—as they were for respondent's counsel here—precisely because they reflect the common law fiduciary duties that are essential to the lawyer-client relationship and that are critical to the constitutionality of the outcome of any criminal proceeding.

For notwithstanding the fact that lawyers are viewed as the agents of their clients, the real relationship between lawyer and client is one of total client dependence: lawyers have all of the knowledge of both the law and the justice system, and clients look to lawyers to guide them through the complexity of a system whose power can be overwhelming. Thus, this Court has repeatedly recognized that lawyers are required to be competent, communicate with their clients, explain the alternatives, and provide clients with candid advice—in sum, to effectively represent the client at all critical stages.

Mr. Toca's representation of Ms. Titlow was remarkable for its extreme deficiency; it was misconduct writ large and in black and white. By endorsing the setting aside of Ms. Titlow's conviction, this Court has the opportunity to remedy a clear case of constitutionally deficient representation.

The significance of this case, however, extends far beyond the correction of injustice in a particular instance. By accepting media rights as compensation for criminal defense, Ms. Titlow's lawyer created a non-waivable conflict of interest that automatically rendered the entire representation deficient. To uphold Ms. Titlow's conviction would be to ignore the uncontested importance of the special rule barring such arrangements to the integrity of the criminal justice system. In contrast, treating the violation of a non-waivable conflict of interest as grounds for finding counsel's performance *per se* deficient would create a clear and easily applied rule that ensures that no criminal defendant is forced to permanently suffer the consequences of such misconduct. Prejudice in this case, however, need not be presumed; it is manifest.

Moreover, Petitioner's suggestion that successor counsel is entitled to rely exclusively upon predecessor counsel's representation in order to discharge his own duties of diligence and competence fundamentally misstates lawyers' ethical duties. If accepted, such a rule would irreparably undermine the provision of effective assistance of counsel in criminal cases involving substitution of counsel.

Petitioner trivializes a lawyer's legal duties by claiming that full obligations of competence and diligence do not govern the conduct of the lawyer whose client wishes to withdraw her plea or expresses the belief that she may be innocent. Endorsing this principle would leave countless clients effectively unrepresented, effectively abandoned.

I. Ms. Titlow's Lawyer Failed to Perform with Minimal Competence by Violating Basic Duties under the Rules of Professional Conduct

Two facts about Mr. Toca's representation of Ms. Titlow are undisputed: he undertook no investigation, and he offered Ms. Titlow no advice. He simply withdrew the plea that Ms. Titlow had submitted under the guidance of previous counsel. His decision to do so despite lacking any familiarity with the case and his subsequent failure to meaningfully represent Ms. Titlow attest to his failure to fulfill two independent and critical fiduciary duties: to perform a competent investigation and to communicate with his client.

A. Ms. Titlow's Lawyer Violated His Duty to Investigate

In order to provide a defendant with constitutionally effective assistance, "counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how to best represent his client." *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). This investigation must include "an independent examination of the relevant facts, circumstances, pleadings and laws." *Foster v. Dugger*, 823 F.2d 402, 405 n.9 (11th Cir. 1987). For example, a lawyer must obtain discovery of and evaluate the government's evidence. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). As an obvious step towards fulfilling this obligation, substitute counsel must, with his client's informed

consent, obtain prior counsel's file and records of prior proceedings.

The Michigan Rules of Professional Conduct, which derive from the ABA Model Rules of Professional Conduct,[2] codify the importance of a complete and thorough investigation to providing competent and diligent representation. Under Rule 1.1, a lawyer may not "handle a legal matter which . . . the lawyer is not competent to handle; handle a legal matter without preparation adequate in the circumstances; or neglect a legal matter entrusted to the lawyer." Mich. Rules of Prof'l Conduct R. 1.1. The comments to the rule further explain: "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners," as well as "adequate preparation." *Id.* cmt. 5; *see also* Mich. Rules of Prof'l Conduct R. 1.3 (describing the lawyer's duty to exercise "reasonable diligence").

As this Court recently noted, "[t]hough the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides." *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012). In its ethical guidance, the American Bar Association (ABA) puts the "common sense" obligation to investigate "in terms no one could misunderstand." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (referring to "defense counsel['s obligation

---

[2] The Model Rules form the basis of the rules of every jurisdiction, save California.

to] obtain information that the State has and will use against the defendant").

Where multiple lawyers are involved in a case, the constitutional and ethical obligation to investigate includes speaking to predecessor counsel and obtaining his file, with the client's consent.[3] *See Wharton v. Jones*, 282 S.E.2d 310 (1981) (finding a guilty plea involuntary where "the second lawyer did not have sufficient time to investigate the case" and "[t]he first public defender did not discuss the. . . case with the second one at any time"); *Cincinnati Bar Ass'n v. Emerson*, 909 N.E.2d 635 (Ohio 2009) (suspending a lawyer in part for "fail[ing] to obtain his client's file from a previous lawyer and . . . not review[ing] court records"); *In the Matter of Mekler*, 669 A.2d 655 (Del. 1995) (suspending a lawyer who delayed reading a client's file for five months). The ethical rules and case law go to great lengths to ensure that prior counsel diligently maintain his or her file and cooperate with successor counsel, so as

---

[3] There is no allegation here that Mr. Toca did not have Ms. Titlow's consent to speak to her former counsel or obtain former counsel's file.

not to prejudice the former client's defense.[4] But all of these admonitions are useless if successor counsel cannot be bothered to pick up the file.

The need for investigation is particularly acute in plea negotiations. Not only is plea bargaining "an essential component of the administration of justice," *Santobello v. New York*, 404 U.S. 257, 260 (1971), but "the decision whether to plead or to go to trial [is] 'probably the most important single decision in any criminal case,'" *Turner v. Tennessee*, 664 F. Supp. 1113, 1119 (M.D. Tenn. 1987), *aff'd*, 858 F.2d 1201 (6th Cir. 1988), *cert. granted, vacated sub nom. Tennessee v. Turner*, 4922 U.S. 902 (1989), *vacated*, 883 F.2d 38 (6th Cir. 1989), *and aff'd*, 940 F.2d 1000 (6th Cir. 1991) (quoting 1 Amsterdam, Segal & Miller, *Trial Manual for the Defense of Criminal Cases*, 2-143 (1967)). As this Court has noted, given the number of cases that end in plea bargains, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Frye*, 132 S. Ct. at 1407 (internal citations omitted).

---

[4] *See, e.g.*, Mich. Rules of Prof'l Conduct R. 1.16(d) ("Upon termination of representation, a lawyer shall take reasonable steps to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, [and] surrendering papers and property to which the client is entitled . . ."); Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 Hofstra L. Rev. 1181, 1187 (2003) ("Once [client] consent is obtained, . . . former counsel can proceed to share everything with his or her successor and in my view is required to do so. Full cooperation should be the watchword of the relationship.").

Here, there is no evidence that Ms. Titlow's second lawyer did *anything at all* to investigate her case, to be informed as to the applicable law, or to assist his client in assessing what amounted to an extremely favorable plea agreement before withdrawing the plea. All the evidence is to the contrary. As the Sixth Circuit observed, "Toca did not obtain Titlow's file, inspect the government's discovery materials, or speak with Lustig (Titlow's former counsel) about the case until January 10, 2002, approximately a month and a half *after* the plea-withdrawal hearing." 680 F.3d at 584. By failing to even attempt an investigation, Mr. Toca did not merely violate his most fundamental obligation as Ms. Titlow's lawyer: he set himself up to violate *all* of his obligations as her lawyer.

B. Having Conducted no Investigation, Titlow's Counsel Failed in His Duty to Offer Informed Opinion

In representing a client considering a plea or plea-withdrawal, a lawyer must evaluate pertinent legal criteria, weigh the advantages and disadvantages of each potential outcome, and understand and convey to the client all important sentencing consequences. In a proposed withdrawal of a guilty plea, this would include a full explanation to the client of the legal predicament the client faced; the risks of alternative courses of action; the benefits of leaving the plea agreement intact; the opportunities available to simply reopen plea negotiations; the legal requirements for entering a plea; and the unpredictability of the result of any trial. The lawyer must then offer his best

recommendations as to how the client should proceed, balancing the client's exclusive right to decide whether to plead with the reality that the lawyer, by virtue of education and experience, will have a more informed view than his client.

Lawyers, moreover, are required to provide objective advice to clients. All prevailing professional standards acknowledge this duty of counsel, particularly in the context of a guilty plea. Mich. Rules of Prof'l Conduct R. 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, *after consultation with the lawyer*, with respect to a plea to be entered . . . .") (emphasis added). This advice must be an honest reflection of the lawyer's best judgment. *See* Mich. Rules of Prof'l Conduct R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."); *id.* cmt. 1 ("A client is entitled to straightforward advice expressing the lawyer's honest assessment."). The Michigan Rules of Professional Conduct emphasize that this duty thus requires lawyers to discuss facts or law that may not please the client. *See id.* cmt. 1 ("Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. . . . [A] lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.").

Under this Court's jurisprudence, a lawyer's failure to render such advice constitutes deficient performance within the meaning of the Sixth Amendment. *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) ("[C]ounsel *must*, after making an

independent examination of the facts, circumstances, pleadings and laws involved, offer his informed opinion as to what plea should be entered.") (emphasis added); *see also, e.g., Walker v. Caldwell*, 476 F.2d 213, 218 (5th Cir. 1973) ("The key words are 'effective assistance of counsel.' Much of the language of our recent cases in the area refers to whether the assistance was 'effective.' We must not ignore the equally important first requirement that appointed counsel actually and substantially *assist* his client in deciding whether to plead guilty.") (emphasis added); *United States v. Villar*, 416 F. Supp. 887, 889 (S.D.N.Y. 1976).

This duty to offer informed and competent advice is no different in the context of withdrawing a plea from the context of entering a plea. Just as counsel has a duty to advise a defendant pleading guilty of the available options and possible consequences, it is "equally essential that the attorney advise a defendant of possible consequences where . . . the defendant withdraws a negotiated plea and stipulated sentence in the minimum range and instead stands trial and faces the maximum sentence." *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981); *see People v. Lewandowski*, 436 N.W.2d 660 (1989) (same); *see also In re Alvernaz*, 2 Cal. 4th 924, 925 (1992). As explained by the Seventh Circuit:

> Both alternate decisions—to plead guilty or instead to proceed to trial—are products of the same attorney-client interaction and involve the same professional obligations of counsel.

> Application of the constitutional guarantee of effective assistance of counsel to the advice given a defendant to plead guilty necessarily encompasses the counterpart of that advice: to reject a proffered plea bargain and submit the issue of guilt to a trier of fact.

Toro v. Fairman, 940 F.2d 1065, 1068 (7th Cir. 1991); *see Turner*, 664 F. Supp. at 1120-21 (noting that the decision whether to go to trial is "the most critical stage in the criminal process" and concluding that ineffective advice to reject a plea offer constitutes a Sixth Amendment deprivation). *Lyles v. State*, 382 N.E.2d 991, 998 (Ind. Ct. App. 1978) (finding ineffective assistance of counsel where defendant went to trial after counsel failed to communicate plea bargain offer).

Indeed, incompetent advice regarding the chances of success at trial can be more insidious than a total failure to inform the accused of the offer. This is because "a defendant ignorant of a plea offer nonetheless may have a perfectly well-informed assessment of his chances at trial," whereas a defendant who rejects a plea offer on the basis of unreasonable advice "not only [has] lost an opportunity to make a bargain, he also is embarking upon a trial with a fundamentally distorted view of his prospects." *Turner*, 664 F. Supp. at 1120 n.17 (citing *Beckham*, 639 F.2d at 267).

Because Ms. Titlow's lawyer breached his duty to investigate, he also necessarily abdicated his responsibility to offer Ms. Titlow "his informed

opinion as to what plea should be entered." *Von Moltke*, 332 U.S. at 721. The record contains "no details about Toca's conversations with Titlow," if any, before the plea withdrawal hearing. 680 F.3d at 583. To put a finer point on it, he had no informed opinion and did not even go through the motions of offering one.

II. Ms. Titlow's Counsel Was Burdened with a Non-Waivable Conflict of Interest

Mr. Toca's conduct so *grossly* deviates from the standard of care—given his failure to even obtain and review a box of files prior to advising his client to withdraw her guilty plea—that it would be virtually inexplicable if not for Mr. Toca's grave, obvious, and non-waivable conflict of interest: he acquired a financial interest in the media rights to Ms. Titlow's story, which, by the terms of the retainer agreement, he could only collect by convincing Ms. Titlow to proceed to trial.

As *amicus* has observed many times, conflicts of interest are different in degree and in kind from other failures of representation because they infect every aspect of the attorney-client relationship and inflict harms that may be difficult to objectively gauge. *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) (noting the seriousness of conflicts of interest, due in part to the difficulties inherent in assessing the impact of the conflict on the attorney's representation). But the noxious effects of the conflict in this case are readily apparent.

The law has long specifically recognized the evils inherent in and the conflicts thereby created by a defendant's assignment of literary or media rights to his or her lawyer prior to the conclusion of the representation.[5] Rule 1.8 of the Michigan Rules of Professional Conduct flatly prohibits such agreements prior to the conclusion of representation of a client. Mich. Rules of Prof'l Conduct R. 1.8; *see also* ABA Standards for Criminal Justice: Defense Function, Standard 4-3.4 (3d ed. 1993) ("[T]he ABA's model standards for criminal defense lawyers forbid any agreement 'with a client or a prospective client' by which a lawyer acquires 'an interest in literary or media rights' to an account based in substantial part on information relating to the representation."); Restatement (Third) of the Law Governing Lawyers § 36 (2000).

The rule's underlying policy is "obvious"[6]: such an agreement drives a wedge between the lawyer's own personal, financial interests and the interests of his client. Mich. Rules of Prof'l Conduct R. 1.8 cmt. 3; ABA/BNA Lawyers' Manual on Prof'l Conduct ("This inherently divided loyalty is the primary reason for

---

[5] *See, e.g., People v. Corona*, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978) (vacating twenty-five first degree murder convictions where attorney had entered into literary rights contract); *see also People v. Gacy*, 530 N.E.2d 1340, 1347 (Ill. 1988); *Corona*, 80 Cal. App. 3d at 721, 145 Cal. Rptr. at 915 (1978); *People v. Bonin*, 765 P.2d 460, 475 (Cal. 1989); *United States v. Hearst*, 638 F.2d 1190, 1193-94 (9th Cir. 1980); *Ray v. Rose*, 535 F.2d 966 (6th Cir. 1976).

[6] 1 Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, *The Law of Lawyering*, § 12.10 at 12-28 (3d ed. 2004 Supp.).

banning lawyers' acquisition of media or literary rights in accounts about their clients before the end of the representation." (citing Model Rules of Prof'l Conduct R. 1.8 cmt. 9 (2013); EC 5-24; Restatement (Third) of the Law Governing Lawyers § 36(3); *id.* cmt. d (2000))).

The story of a defendant who pleads guilty, let alone to a lesser offense, is boring and virtually worthless from a marketing perspective.[7] *See* Mich. Rules of Prof'l Conduct R. 1.8 cmt. 3 ("Measures suitable in the representation of the client may detract from the publication value of an account of the representation."); Hazard, Hodes and Jarvis, *supra* at 12-28 ("A lawyer holding media rights to the story of the very case in which he is involved has an interest in seeing the case sensationalized. The lawyer also has the means of sensationalizing it, by his choices of tactics and by the recommendations he makes to the client (not to plead guilty to a lesser charge, for example).").

Ms. Titlow's lawyer's performance was a textbook example of why such agreements have been uniformly decried. Saddled with this conflict, Mr. Toca performed precisely as expected. He was interested in Ms. Titlow's case only should it proceed to trial, and he was determined to have her plea withdrawn using whatever ruse necessary. From the moment Mr. Toca signed the retainer agreement, he "was devoted to two materials with conflicting interests [and] he was forced to choose between his

---

[7] Mr. Toca was not even entitled to the rights under the retainer agreement should the case not proceed to trial. The retainer agreement labels the rights explicitly as his "trial fee."

own pocketbook and the best interest of his client, the accused." *Corona*, 80 Cal. App. 3d at 720, 145 Cal. Rptr. at 915.

The lawyer's financial interest "is so likely to conflict with the lawyer's interest in procuring the best result for the client that the prohibition of Rule 1.8(c) is absolute . . . . Rule 1.8(c) does not allow for the possibility of waiver in any circumstances," D.C. Bar Legal Ethics Comm., Op. 334 (2006), and defiance of this rule is among the select group of "non-waivable" conflicts of interest that often results in suspension or disbarment. *See, e.g., In re Kepple*, M.R. No. 12026 (1/23/96) (attorney suspended for one year in part for obtaining a proprietary interest in a client's case by conditioning representation of the client on an interest in literary rights); *Harrison v. Mississippi Bar*, 637 So. 2d 204 (Miss. 1994) (disbarment where attorney, *inter alia*, signed movie contract for his "life story" with section on ongoing representation of client).

Mr. Toca himself was disbarred in part for his flagrant and gross violation of this Rule.[8] Misconduct so egregious as to require measures to prevent the lawyer from inflicting harms on future clients also demands remedy for the affected client.

---

[8] *See, e.g., United States v. Soto-Lopez*, 475 F. App'x 144, 147 (9th Cir. 2012) ("When the serious doubts about De Olivas's professionalism and honesty occasioned by his contemporaneous conduct are combined with the facts of his representation of Soto-Lopez, the record supports Soto-Lopez's claim that De Olivas provided him ineffective assistance of counsel.").

III. Petitioner's Excuses for Mr. Toca's Misconduct Are Without Merit

Under the guidance of her counsel, Ms. Titlow pled guilty. Under the guidance of a new lawyer burdened by an egregious conflict of interest, Ms. Titlow then embarked on a course that began—and ended—with the withdrawal of her plea. The facts lead inexorably to the conclusion that Mr. Toca was ineffective, abdicating all responsibility to Ms. Titlow. The four excuses that Petitioner offers for this misconduct are not merely unavailing; the decision to dignify them could deny effective counsel to countless criminal defendants deciding whether or not to plead guilty—the most critical choice one can make in the course of a criminal proceeding.

A. The Lawyer Must Investigate even if the Client Claims Innocence

Petitioner argues that since Ms. Titlow retained new counsel after being told that she was "innocent" by the county guard, her subsequent lawyer had no independent obligation to address the wisdom of withdrawing the plea. This claim is wholly devoid of merit.

First, under this logic, defendants who at any point state a belief in their innocence endanger their right to have their lawyers conduct *any* investigation or offer informed advice as to the wisdom of submitting or withdrawing a plea.[9] The implications are profound, given that clients routinely protest

---

[9] Taken to its logical extreme, this would include individuals who entered a preliminary plea of not guilty to a charge.

their innocence to their lawyers during the course of representation, whether or not they actually believe or have grounds for believing that they are innocent. *People v. Collazo*, 11 Misc. 3d 1052(A) (N.Y. 2006); Robert Mostettler, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 Santa Clara L. Rev. 1, 37, 41 (2010); Margaret Raymond, *The Problem with Innocence*, 49 Clev. St. L. Rev. 449 (2001); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L.J. 1179, 1310 (1975) ("Most defendants do not understand our system of justice and cannot be made to understand. They are, in the main, too optimistic: they believe that if their attorneys were willing to fight vigorously on their behalf, they might be acquitted."). Every day, after claiming their innocence in the face of overwhelming evidence to the contrary, criminal defendants are found guilty.

Second, innocence is a difficult topic to address, both as a matter of fact and as a matter of law. Clients may consider themselves innocent because they view their role in the matter as not giving rise to any criminal responsibility;[10] because they believe there was legal justification for their conduct;[11] because they do not understand the

---

[10] *Criminal Justice Prosecution Function and Defense Function Standards* 4-4.1 cmt. (noting that "an essential function of the advocate is to make a detached professional appraisal independent of the client's belief that he or she is *or is not* guilty").

[11] *People v. Wilkins*, 141 N.W.2d 664 (1966).

elements of the crime;[12] because they underestimate the strength of the prosecution's case;[13] or because they are simply confused, scared to admit criminal responsibility, worried that otherwise their lawyers will not fight vigorously on their behalf, or have convinced themselves of the truth of their version of the facts when all reasonable views are to the contrary.[14] Michigan courts have recognized that a client's assertion *during the plea colloquy itself* that he "still think[s] [he's] innocent, though" does not necessarily constitute "a protestation of innocence or a 'qualification' of the plea of guilty . . . which would

---

[12] *See, e.g., State v. Barnett*, No. 0311017379, 2006 WL 3308211 (Del. Super. 2012) (explaining that the defendant "had difficulty with the concept that he committed a burglary because they just opened the door and walked in as opposed to breaking in or forcing their way in," despite being "an intelligent person who had never hesitated to question what was going on"). Particularly in cases of accomplice liability, it is "difficult for defendants to apply the 'liability conduct of another' to themselves." *Barnett*, 2006 WL 3308211 at 5. *See, e.g., State v. Woods*, A06-1483, 2007 WL 2472331 (Minn. Ct. App. 2007) (quoting *State v. Crow*, 730 N.W.2d 272, 280 (Minn. 2007) (attributing the defendant's assertion of innocence to a misunderstanding of accomplice liability)).

[13] *See, e.g., United States v. Osorio*, 7 F.3d 236 (6th Cir. 1993) (per curiam) (rejecting the defendant's attempt to withdraw his plea based on the observation that he "was under the mistaken notion that only direct evidence of guilt could have been introduced at trial").

[14] Smith, *supra*, at 491 ("[U]ncovering a client's autonomous wishes is more complicated than simply asking the client what he or she wants to do. *The words "I ain't takin' no plea" can mean many different things: I'm scared about what is happening to me; I don't like any of the choices available to me; I don't trust you; I don't trust anyone.*").

require the rejection of the plea." *See People v. Wilkins*, 141 N.W.2d 664, 667 (1966).

As a result, the lawyer must assess the implications of a client's claim of innocence. In the context of plea negotiations, this involves conducting a thorough investigation and offering the client the lawyer's best judgment as to whether the client should accept a guilty plea or confront the likely result of the client's continuing to assert the client's innocence.

It is universally recognized that lawyers' professional responsibilities exist to the same extent regardless of their clients' statements as to their guilt.[15] *See Criminal Justice Prosecution Function and Defense Function Standards* 4-4.1 cmt. ("The lawyer's duty to investigate is not discharged by the accused's admission of guilt to the lawyer or by the accused's stated desire to enter a guilty plea."); *see also Rompilla*, 545 U.S. at 387 (2005); *Sims v. Livesay*, 970 F.2d 1575, 1579 (6th Cir. 1992) ("The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.").

To rule that an untutored client's claim of innocence ends the lawyer's responsibilities to investigate and advise would be to defeat the claim

---

[15] *See, e.g., Blanco v. Singletary*, 943 F.2d 1477, 1501-03 (11th Cir. 1991) (counsel ineffective for "latch[ing] onto" client's assertions he did not want to call penalty phase witnesses and failing to conduct an investigation sufficient to allow their client to make an informed decision to waive mitigation).

to ineffective assistance of counsel in any case in which a client announces he or she is "innocent." This would run contrary to the principles embraced by the courts. For example, in *Turner v. Tennessee*, the Sixth Circuit affirmed the decision of a district court that found that a client's profession of innocence does not excuse the failure to offer that client advice as to whether to accept or reject a plea bargain. *Turner v. Tennessee*, 858 F.2d 1201, 1206 (6th Cir. 1988), *cert. granted, vacated sub nom. Tennessee v. Turner*, 492 U.S. 902 (1989). In that case, the defendant insisted upon his innocence both publicly and privately, yet the court held that the defense lawyer had an obligation to analyze the evidence with his client and to confront him with that evidence, if necessary, to ensure he understood the import of his decision to reject the plea offer. *Turner*, 664 F. Supp. at 1120-22.

Any other standard would not only hinder open and honest communication between lawyer and client (rendering effective advocacy impossible), but also further encourage lawyers to avoid the difficult but necessary task of providing honest advice to their clients. Competent, diligent lawyers do not "abdicat[e] [their] professional responsibility . . . [by] tak[ing] a client's ill-considered, irrational, or immature 'no' for an answer" or "simply acquiesce[ing] to their foolish wishes" out of "laziness, for being afraid to really engage with a client, or worse." Smith, *supra*, at 491; *see also* Alschuler, *supra*, at 1309 ("An attorney has an obligation to give his client the benefit of his experience, to offer his advice on the most important question that the client faces, and to insure that the

client understands as fully as possible the likely consequences of his choice.")

Further, even if it were the case that a lawyer has no duty to investigate or to advise his or her client of the desirability of a plea where his client *credibly* and *consistently* maintains his or her innocence (a position *amicus* strongly rejects), this was not the case here. The Petitioner claims that Ms. Titlow asserted her "innocence" only after speaking to a jail house guard who advised her not to plead guilty. At no point did Ms. Titlow offer a factual or legal basis for her assertion.[16] Recognizing how susceptible defendants are to such misadvice,[17] courts have found similarly induced "assertions of innocence" to be not only wholly devoid of credibility, but also ill-advised bases for the withdrawal of a guilty plea.[18] *See Osorio*, 7 F.3d at 2 (rejecting the defendant's newfound claim of innocence as a basis

---

[16] In fact, the Petitioner does not even endeavor to distinguish between "factual innocence" and "legal innocence." It is unclear which of these forms applied to Ms. Titlow and equally ambiguous which type of "innocence claim" would absolve counsel of any duty to investigate or render advice other than to proceed to trial.

[17] One court detailed how difficult it is for even factually-guilty clients to plead guilty: "First of all, during a plea, a defendant must discard the security and mighty presumption of innocence. Secondarily, the defendant admits what has typically been steadfastly denied. And, oftentimes, the admission is exchanged for an agreement to receive a considerable period of incarceration." *Collazo*, 11 Misc. 3d at 5.

[18] *Id.* ("Clearly before he had been coached by 'jail house lawyers,' he had weighed the merits of a plea against the perils of a trial and had selected the former." (footnote omitted)).

for withdrawing his plea where a "'jailhouse lawyer' asserted that he had reviewed the government's evidence against the defendant and the defendant was innocent"); *Barnett*, 2006 WL 3308211 at 2 (noting that the defendant "has not provided any basis to now assert his innocence," despite trying to do so after "consult[ing] directly with a 'jail house lawyer'" who advised him to withdraw his plea).

Finally, it cannot be said that Ms. Titlow was adamant about not pleading guilty and would have withdrawn her plea irrespective of her lawyer's constitutionally deficient advice. This would suggest that Ms. Titlow refused to cede in the face of her lawyer's contrary advice. Because there is no evidence that her lawyer gave her *any* advice about the benefits of pleading guilty, it is logically impossible to make this claim. Further, the record offers no mention during the plea hearing itself of any assertion of innocence by "either Titlow or Toca." 680 F.3d at 583. What the record does show are conversations between the prosecution and Mr. Toca concerning a dispute over the proper sentencing range, and a plea hearing in which that disputed range was Mr. Toca's stated reason for withdrawal.

The eleventh-hour maneuvering of Ms. Titlow's lawyer to get the plea offer *modified* rather than *withdrawn* alone is a glaring indication that he believed that Titlow would not have been deaf to accepting the offer from the government under any circumstances. *See, e.g., Alvernaz v. Ratelle*, 831 F. Supp. 790 (S.D. Cal. 1993) ("Had Petitioner been adverse to the idea of a plea bargain, the second settlement offer would not have taken place. The

Sixth Circuit has held that a plea counter-offer constitutes sufficient 'objective' evidence to corroborate the type of ineffective assistance claim at issue.").

B. The Client Has the Authority to Decide to Plead Guilty, but the Lawyer Has the Duty to Advise the Client in Making this Decision.

The Petitioner's second attempt to excuse Mr. Toca's ineffectiveness ironically relies on a misreading of the rules of professional conduct. Because Rule 1.2 vests the ultimate authority to choose whether to plead guilty with the client, Mich. Rules of Prof'l Conduct R. 1.2(a), the Petitioner asserts that the lawyer is somehow relieved of his duties to investigate and to advise the client as the client makes this decision. Nothing could be farther from the truth.

To suggest that the client's final decision-making authority somehow relieves her lawyer of his responsibility to advise her in making this decision renders this Court's recognition of the need for effective assistance of counsel in connection with guilty pleas a nullity. *See Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding that lawyers must advise their clients if their pleas carry the risk of deportation); *Libretti v. United States*, 516 U.S. 29, 50-51 (1995) ("[I]t is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo.").

Moreover, this argument wholly misconstrues the text, clear intent, and spirit of the Michigan Rules of Professional Conduct. Although Michigan Rule 1.2 gives clients power over decision-making, "counsel *may and must* give the client the benefit of his professional advice on this crucial decision." 1 Amsterdam, Segal & Miller, *Trial Manual for the Defense of Criminal Cases*, 2-143 (1967) (emphasis added). As the courts have repeatedly recognized, the client's decision-making can only take place after she has been advised by a well-informed lawyer who has thoroughly investigated the case both factually and legally and provided the client with his best advice. *See Lewandowski v. Makel*, 754 F. Supp. 1142, 1148 (W.D. Mich. 1990); *People v. Pollard*, 282 Cal. Rptr. 588, 594 (Cal. App. 1991) (noting that when counsel fails to "advise or has misstated some aspect of the law important to the intelligent evaluation of the [plea] offer, deficient representation has been demonstrated"); *Pennsylvania v. Napper*, 385 A.2d 521, 524 (P.A. 1978) (stating that counsel's failure to make clear the risks, hazards, or prospects of the case constitutes ineffective assistance).

Under prevailing professional norms, "it is the attorney, not the client, who is particularly qualified to make an informed evaluation of a proffered plea bargain." *People v. Maguire*, 67 Cal. App. 4th 1022, 1028 (1998). Both the Model Rules of Professional Conduct and the constitutional guarantee of effective assistance "embod[y] a realistic recognition . . . that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty."

Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938). Thus, it is a matter of common sense that "[n]o diligent, client-centered lawyer would blithely accept a client's repudiation of an excellent plea offer without intense engagement." Abbe Smith, *The Lawyer's Conscience and the Limits of Persuasion*, 36 Hofstra L. Rev. 479 (2007).

This Court's prior jurisprudence and the ethical rules demand that when a defendant is considering a guilty plea, his lawyer must analyze his case's strengths and weaknesses, consider those details in the context of his knowledge and experience, provide his client with his unvarnished evaluation of the case, and *only then* rely on his client's decision. By suggesting otherwise, Petitioner's argument stands the dynamics of the lawyer-client relationship on its head.

C. Predecessor Lawyer did not Absolve Substitute Lawyer of Ethical Responsibility

The quality of predecessor counsel's performance is irrelevant to establishing substitute counsel's deficient performance. Each lawyer has an "*independent* duty to investigate and prepare," *Sanders*, 21 F.3d at 1457 (emphasis added), which "includes at a minimum an *independent* examination of the relevant facts, circumstances, pleadings and laws," *Foster*, 823 F.2d at 405 n.9 (emphasis added). Because "[e]ach attorney has an independent duty to represent the client," "when an attorney takes over a case *the rule is that counsel [is] not in fact . . . allowed to rest on the laurels of prior counsel.*" *Colvin*

v. Warden, State Prison, No. CV094002812, 2012 WL 4465845 (Superior Ct. 2012) (emphasis added). Of course, here, it cannot even be said that Ms. Titlow's second lawyer allowed himself to "rest on the laurels of prior counsel," since in addition to failing to undertake his own investigation, Mr. Toca did not even bother to pick up the file detailing the investigation undertaken by his predecessor.

Whether one lawyer provided accurate or sufficient advice does not bear on another lawyer's failure to consequently render accurate or sufficient advice. For example, in *United States v. Soto-Lopez*, the Ninth Circuit recently rejected a similar argument that the petitioner "had the tools he needed to make an intelligent decision about rejecting the plea deal" because prior to receiving the deficient advice from a second lawyer, he "was properly advised by the Federal Defenders." 475 F. App'x at 145 and n.1. The court explained that the petitioner's "ineffective assistance claim center[ed] on whether [the second lawyer's] 'representation fell below an objective standard of reasonableness.'" *Id.* at n.1. "The Federal Defenders' performance [was] irrelevant to this inquiry, especially because during the time he represented Soto-Lopez, [the second lawyer] advised him that the Federal Defenders had provided the wrong advice." *Id.*

The rule reflects the simple fact that the ethical failure of one lawyer can undo the competent efforts of another. Any informed decision Ms. Titlow may have been able to make based on Lustig's representation was vitiated by the unethical and illegal actions of Mr. Toca when he interfered with

the established relationship between Ms. Titlow and her lawyer and told Ms. Titlow that the prior advice she had received had been inadequate. This conduct violated Rule 7.3 of the Michigan Rules of Professional Conduct, which prohibits a lawyer from soliciting a client, either in-person or over the telephone, for pecuniary gain. Mich. Rules of Prof'l Conduct R. 7.3(a); *see also Nostrame v. Santiago*, 61 A.3d 893, 903 (N.J. 2013) (describing the lawyer's "ethical obligation not to interfere with an existing or ongoing attorney-client relationship.").

In forbidding such solicitation, Rule 7.3 recognizes that "trained advocate[s]" can exert undue influence on clients, who may not only be especially vulnerable but who "may find it difficult to evaluate fully all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately." Mich. Rules of Prof'l Conduct R. 7.3 cmt. 1. Such solicitation is particularly egregious here given that Mr. Toca preyed upon a criminal defendant, one who was inherently "more vulnerable to suggestion or promises of performance than an ordinary person." Ohio Board of Comm'rs on Grievances and Discipline, Adv. Op. 90-21, 1990 WL 640516 (1990). To rule otherwise would be to leave all plea bargaining defendants—in other words, most defendants—at the mercy of unethical lawyers prepared to swoop in on sensational cases.

Finally, even if a lawyer could discharge his ethical obligations in some instances by relying on the assumption that a prior lawyer had imparted

adequate and accurate information, here the first lawyer offered advice as to a different issue: whether to *plead* guilty. Under prevailing professional standards, that advice cannot be relied upon to satisfy the lawyer's ethical obligation to fully and completely advise his client about the risks and consequences of *withdrawing* from a plea agreement, which is a separate decision with very different implications from the decision to enter a plea in the first instance. To focus on the advice given by Ms. Titlow's first lawyer actually reinforces the point that he was prejudiced by the erroneous advice that he was subsequently given at the plea withdrawal stage. *See Lewandowski v. Makel*, 949 F.2d 884, 889 (6th Cir. 1991).

D. Time Constraints did not Prevent Ms. Titlow's Lawyer from Investigating or Providing Counseling

The State further claims that Mr. Toca did the best he could under the circumstances given the lack of time to perform competently, thereby ignoring the fact that it was Mr. Toca who intervened in an existing lawyer-client relationship and convinced Ms. Titlow to withdraw her plea, in violation of Rule 7.3. This contention as well fails on multiple levels.

First, Ms. Titlow's lawyer should never have agreed to undertake this representation if he lacked the time to adequately advise his client as to the merits of withdrawing her plea. While a lawyer is entitled at the outset of a representation to define the representation's scope, the lawyer may not

unreasonably limit that scope so as to eliminate the lawyer's underlying legal and ethical duties. Mich. Rules of Prof'l Conduct R. 1.2 and cmt. 5. Limitations are inherently unreasonable "if the limitation constitutes a breach of the duty of competence, or any other ethical duty," *In re Seare*, 2013 WL 2321664 at 21 (Bankr. D. Nev. 2013).

A lawyer cannot blindly accept a client's assertion that she has independently ascertained that it is in her best interest to withdraw a plea any more than he can blindly accept a client's assertion that it is in her best interests to file for bankruptcy.[19] The State misstates the power of a lawyer to limit the scope of a representation when it suggests that the competent advice of Ms. Titlow's former counsel enabled Mr. Toca to represent Ms. Titlow for the limited purpose of the plea withdrawal hearing despite Mr. Toca's failure to conduct an adequate investigation.

Second, *any* restriction on the scope of representation, *no matter how reasonable*, must be accompanied by "consent[] after consultation," which was clearly lacking here. *See* Mich. Rules of Prof'l Conduct R. 1.2(b); *see also* Model Rules of Prof'l Conduct R. 1.0(e) (defining informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated

---

g[19] *See, e.g., In re Seare, supra*, at 18-19 (explaining that a lawyer unreasonably limited the scope of the representation by "improperly plac[ing] the burden on the Debtors to make [a] legal conclusion" as to whether it was in their interests to file for bankruptcy and noting that a client's "pre-consultation expectations may be unreasonable or unachievable").

adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct"). Mr. Toca's retainer letter did not inform Ms. Titlow that he intended to limit his duties in any way; that if his client accepted his uninformed advice that she would be proceeding at her peril; or that Mr. Toca's dedication to the client's cause was contingent on his obtaining a book deal.

Third, the common-sense expectation is that a lawyer in need of more time to competently represent his client will request more time. *United States v. Osorio*, 929 F.2d 753, 758 (1st Cir. 1991) ("Generally, we have viewed the failure to ask for a continuance as an indication that defense counsel was himself satisfied he had sufficient opportunity to use the evidence advantageously."). Courts have rightly considered the failure to request a continuance in assessing the validity of claims of insufficient time. For example, defense counsel's failure to request a continuance for purposes of examining newly disclosed material vitiates a later Brady claim. *See Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Aviles-Colon*, 536 F.3d 1, 26 (1st Cir. 2008) (noting that defense counsel must typically request a continuance to preserve a claim of prejudice by delayed disclosure of evidence); *United States v. Andrews*, 532 F.3d 900, 907 (D.C. Cir. 2008) (rejecting defense counsel's claim that it lacked time to review evidence submitted late by the government, based in part on the fact that defense counsel had squandered two opportunities to request a continuance).

Finally, judging strictly from Mr. Toca's performance within the short time between his substitution and the hearing on withdrawal, he failed to make any good-faith efforts to attempt an investigation, since in even the time allotted he could have learned an enormous amount. This undermines any claim that time constraints explain, much less excuse, his failure to counsel his client. Mr. Toca's decision to do nothing in the time available only confirms his complete disinterest in his client's cause. Just as greed compelled Mr. Toca to intervene in the case, greed compelled him to abandon it. As soon as it became clear that there were no media rights to be had, Mr. Toca lost all desire to even pretend to serve as Ms. Titlow's advocate.

Conclusion

Where, as here, a lawyer conducts no investigation, possesses insufficient information to render a competent legal opinion, and labors under a crippling conflict of interest of his own design, the client's Sixth Amendment rights have been violated, especially when the representation offered to the client serves only to eviscerate the competent representation of previous counsel. In providing legal advice and services to Ms. Titlow during the withdrawal of her plea, Mr. Toca was not entitled to rely on the efforts of Ms. Titlow's former counsel or Ms. Titlow's claim to innocence to excuse his own gross incompetence. To hold that he was would be to recast the right to effective assistance of counsel *at all critical stages* of the criminal proceeding as the right to effective assistance of counsel at only *certain*

critical stages of a proceeding. *Amicus* encourages the Court to take the opportunity this case presents to reaffirm the full extent of the constitutional obligations of competence, communication, diligence and loyalty that all criminal defense lawyers—indeed, all lawyers—owe their clients.

Respectfully submitted,

LAWRENCE J. FOX
Counsel of Record
DRINKER BIDDLE & REATH LLP
One Logan Square, Suite 2000
Philadelphia, Pennsylvania 19103
(215) 988-2700
Lawrence.Fox@dbr.com

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

FILED
JUL 24 2013
OFFICE OF THE CLERK

No. 12-414

IN THE
Supreme Court of the United States

SHERRY L. BURT,

Petitioner,

v.

VONLEE TITLOW,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

DAVID M. PORTER
Co-Chair,
Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
801 I Street, 3rd Fl.
Sacramento, CA 95814
(916) 498-5700

DAVID DEBOLD
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
ddebold@gibsondunn.com

AKIVA SHAPIRO
SETH ROKOSKY
SARAH KUSHNER
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

Counsel for Amicus Curiae

Library of Congress
Law Library

QUESTIONS PRESENTED

Amicus curiae the National Association of Criminal Defense Lawyers will address the first and second questions presented in the petition for certiorari:

1. Whether the Sixth Circuit failed to give appropriate deference to a Michigan state court under AEDPA in holding that defense counsel was constitutionally ineffective.

2. Whether a convicted defendant's subjective testimony that she would have accepted a plea but for ineffective assistance, is, standing alone, sufficient to demonstrate a reasonable probability that defendant would have accepted the plea.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 6

I. THE PROPOSED "STATED-BELIEF-IN-INNOCENCE" EXCEPTION ON WHICH THE STATE'S ARGUMENT RESTS WOULD BE INCONSISTENT WITH THE ROLE OF COUNSEL IN OUR LEGAL SYSTEM, AND WITH THIS COURT'S DECISIONS CLEARLY ESTABLISHING AN ATTORNEY'S SIXTH AMENDMENT DUTY TO PROVIDE EFFECTIVE ASSISTANCE AT THE PLEA STAGE. 6

A. Criminal Defense Attorneys Have a Duty to Conduct a Thorough, Independent Factual Investigation, in Order to Properly Evaluate the Strengths and Weaknesses of the Case. 7

B. Criminal Defense Attorneys Have a Duty to Provide Objective, Informed Advice on the Law, the Facts, and the Realistic Risks of Going to Trial, So That the Client Can Understand the Charges and the Evidence and Intelligently Evaluate Her Plea Options. 11

TABLE OF CONTENTS—Continued

Page

C. Authorities of Numerous Stripes—Including Leading Scholars and Practitioners, National Criminal Defense Organizations, Authoritative Treatises, the ABA, and State and Local Public Defender Offices—Universally Require Counsel to Fulfill the Duties of Investigation and Advice Regardless of Whether the Client has Expressed Her Belief that She Is Either Innocent or Guilty. 16

II. *STRICKLAND* ALLOWS COURTS TO FIND A REASONABLE PROBABILITY THAT A DEFENDANT WOULD HAVE PLEADED GUILTY BUT FOR DEFICIENT COUNSEL WHEN EITHER: (A) HER TESTIMONY TO THAT EFFECT IS BOLSTERED BY OBJECTIVE CORROBORATING EVIDENCE; OR (B) HER TESTIMONY IS INHERENTLY CREDIBLE. 23

A. There Is No Dispute that a Defendant May Demonstrate Prejudice by Identifying "Objective" Evidence that Corroborates Her Testimony, as Respondent Did in this Case. 24

B. This Court Need Not Foreclose the Possibility of the Rare Case In Which a "Reasonable Probability" of Prejudice Is Satisfied by a Defendant's Credible Testimony. 29

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. City of Bessemer City,
470 U.S. 564 (1985).....33

Beckham v. Wainwright,
639 F.2d 262 (5th Cir. 1981) 15

Blackledge v. Allison,
431 U.S. 63 (1977).....21

Boria v. Keane,
99 F.3d 492 (2d Cir. 1996) 19, 22, 23

Brady v. United States,
397 U.S. 742 (1970).....7, 12, 21

Colson v. Smith,
438 F.2d 1075 (5th Cir. 1971).....12

Dedvukovic v. Martin,
36 F. App'x 795 (6th Cir. 2002) 27, 29

Diaz v. United States,
930 F.2d 832 (11th Cir. 1991).....25, 29

Engelen v. United States,
68 F.3d 238 (8th Cir. 1995) 26, 29, 31

Faretta v. California,
422 U.S. 806 (1975).....8

Gallarelli v. United States,
441 F.2d 1402 (3d Cir. 1971) 14

TABLE OF AUTHORITIES—Continued

Page(s)

Griffin v. United States,
330 F.3d 733 (6th Cir. 2003) 29, 32

Hamilton v. Alabama,
368 U.S. 52 (1961).....12

Henderson v. Morgan,
426 U.S. 637 (1976).....4, 21

Herring v. Estelle,
491 F.2d 125 (5th Cir. 1974) 12

Hill v. Lockhart,
474 U.S. 52 (1985).....10

Inwood Labs., Inc. v. Ives Labs., Inc.,
456 U.S. 844 (1982).....31

Johnson v. Duckworth,
793 F.2d 898 (7th Cir. 1986) 25, 31

Kimmelman v. Morrison,
477 U.S. 365 (1986).....3, 9, 11

Lafler v. Cooper,
132 S. Ct. 1376 (2012).....*passim*

Lafler v. Cooper,
376 Fed. App'x 563 (6th Cir. 2010) 28

Lewandowski v. Makel,
949 F.2d 884 (6th Cir. 1991) 26, 29, 31

TABLE OF AUTHORITIES—Continued

Page(s)

Libretti v. United States,
516 U.S. 29 (1995).....11, 14

Lockhart v. Fretwell,
506 U.S. 364 (1993).....5, 23, 30

Magana v. Hofbauer,
263 F.3d 542 (6th Cir. 2001) 25, 28, 29

McCarthy v. United States,
394 U.S. 459 (1969).....12

McMann v. Richardson,
397 U.S. 759 (1970).....2

Merzbacher v. Shearin,
706 F.3d 356 (4th Cir. 2013),
petition for cert. filed, __ U.S.L.W. ___
(U.S. Apr. 25, 2013) (No. 12-9952) 5, 23, 25

Michigan v. Harvey,
494 U.S. 344 (1990).....8

Miller v. Champion,
262 F.3d 1066 (10th Cir. 2001).....24

Missouri v. Frye,
132 S. Ct. 1399 (2012).....25, 26, 27

Moses v. United States,
No. 97-3938,
1999 WL 195675 (8th Cir. 1999) 25

TABLE OF AUTHORITIES—Continued

Page(s)

North Carolina v. Alford,
400 U.S. 25 (1970).....5, 21, 22

Padilla v. Kentucky,
130 S. Ct. 1473 (2010).....*passim*

Paters v. United States,
159 F.3d 1043 (7th Cir. 1998).....*passim*

People v. Townes,
218 N.W.2d 136 (Mich. 1974).....20

People v. Wilder,
308 N.W.2d 112 (Mich. 1981),
overruled on other grounds by
People v. Ream,
981 Mich. 223 (Mich. 2008).....20

Porter v. McCollum,
558 U.S. 30 (2009).....8, 9, 10, 19

Powell v. Alabama,
287 U.S. 45 (1932).....4, 6, 19

Raysor v. United States,
647 F.3d 491 (2d Cir. 2011).....28

Roe v. Flores-Ortega,
528 U.S. 470 (2000).....3

Rompilla v. Beard,
545 U.S. 374 (2005).....8, 9, 19

TABLE OF AUTHORITIES—Continued

Page(s)

Silva v. Woodford,
279 F.3d 825 (9th Cir. 2002) 19

Smith v. United States,
348 F. 3d 545 (6th Cir. 2003).....13, 19, 25, 29

Strickland v. Washington,
466 U.S. 668 (1984).....*passim*

Titlow v. Burt,
680 F.3d 577 (6th Cir. 2012) 26, 27

Turner v. Tennessee,
858 F.2d 1201 (6th Cir. 1988),
vacated on other grounds,
492 U.S. 902 (1989), *reinstated*,
726 F. Supp. 1113 (M.D. Tenn. 1989) 25, 29

United States ex rel Healey v. Cannon,
553 F.2d 1052 (7th Cir. 1977).....12

United States v. Barker,
514 F.2d 208 (D.C. Cir. 1975).....20

United States v. Day,
969 F.2d 39 (3d Cir. 1992) 25, 32

United States v. Gaskins,
485 F.2d 1046 (D.C. Cir. 1973).....22

United States v. Gordon,
156 F.3d 376 (2d Cir. 1998) 25, 29

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Morris,
106 F. App'x 656 (10th Cir. 2004) 25

United States v. Morris,
470 F.3d 596 (6th Cir. 2006) 29

United States v. Nigro,
419 F. App'x 244 (3d Cir. 2011).....28, 31

United States v. Nixon,
418 U.S. 683 (1974).....7

United States v. Vonn,
535 U.S. 55 (2002).....21

Von Moltke v. Gillies,
332 U.S. 708 (1948).....*passim*

Wiggins v. Smith,
539 U.S. 510 (2003).....3, 8, 9, 10

Williams v. Kaiser,
323 U.S. 471 (1945).....6, 14

Williams v. Taylor,
529 U.S. 362 (2000).....3

Statutes

28 U.S.C. § 2254(d)(2) 33

28 U.S.C. § 2254(e)(1).....33

La. Admin. Code tit. 22, § 717(A) (2013) 18

TABLE OF AUTHORITIES—Continued

Page(s)

Constitutional Provisions

U.S. Const. amend. V 12

U.S. Const. amend. VI ..... *passim*

Other Authorities

1 Anthony G. Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases* (5th ed. 1988) 18

2 Z. Swift, *A System of Laws of the State of Connecticut* (1796) 8

5 Wayne R. LaFave et al., *Criminal Procedure* (West 2012) 14, 18

ABA Code of Prof'l Responsibility (1992) 14

ABA Standards for Criminal Justice: Pleas of Guilty (3d ed. 1999)

Standard 14-3.2 8

Standard 14-3.2 cmt. 12, 14

Standard 14-3.2(b) 13

Standard 14-3.2(b) cmt. 13

TABLE OF AUTHORITIES—Continued

Page(s)

ABA Standards for Criminal Justice: Prosecution and Defense Function (3d ed. 1993)

Standard 4-1.2(b) 6

Standard 4-3.2 cmt. 7

Standard 4-3.2(a) 9

Standard 4-4.1 cmt. 8

Standard 4-4.1(a) 7, 9, 18

Standard 4-5.1 cmt. 13

ADKT No. 411, Ex. A (Nev. Jan. 4, 2008) 18

Alschuler, Albert W., *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L.J. 1179 (1975) 17

Ariz. Pub. Defender Ass'n Performance Standards for Indigent Def. Counsel V.A (June 2006) 18

Benner, Laurence A., *Expanding the Right to Effective Counsel at Plea Bargaining: Opening Pandora's Box?*, 27 Crim. Just. 4 (2012) 18

TABLE OF AUTHORITIES—Continued

Page(s)

Bibas, Stephanos,
Harmonizing Substantive Criminal Law Values & Criminal Procedure: The Case of Alford & Nolo Contendere Pleas,
88 Cornell L. Rev. 1361 (2003) 16, 21

Bibas, Stephanos,
Comment, *Incompetent Plea Bargaining & Extrajudicial Reforms*,
126 Harv. L. Rev. 150 (2011) 31

Bibas, Stephanos,
Plea Bargaining Outside the Shadow of Trial,
117 Harv. L. Rev. 2463 (2004) 22

Cassell, Paul G.,
Some Skeptical Observations On the Proposed New "Innocence" Procedures,
56 N.Y.L. Sch. L. Rev. 1063 (2011) 22

Commonwealth of Va., Standards of Practice for Indigent Counsel 4.1
(Mar. 15, 2012) 18

Easterbrook, Frank H.,
Plea Bargaining as Compromise,
101 Yale L.J. 1969 (1992) 21

TABLE OF AUTHORITIES—Continued

Page(s)

Gooch, Anne D.,
Admitting Guilt by Professing Innocence: When Sentence Enhancements Based on Alford Pleas Are Unconstitutional,
63 Vand. L. Rev. 1755 (2010) 21

Gwinnett Judicial Circuit, State of Ga.,
Indigent Def. Program 4.1 (Jan. 2011) 18

McCoy, Thomas R., & Michael J. Mirra,
Plea Bargaining as Due Process in Determining Guilt,
32 Stan. L. Rev. 887 (1980) 28

Mosteller, Robert P.,
Why Defense Attorneys Cannot, But Do, Care About Innocence,
50 Santa Clara L. Rev. 1 (2010) 17

N.D. Comm'n on Legal Counsel for Indigents, Performance Standards,
Criminal Matters 7.1 (undated) 18

Office of the State Pub. Defender,
Standards for Counsel Representing Individuals Pursuant to the Mont. Pub. Defender Act VI.6.A (Dec. 2012) 18

TABLE OF AUTHORITIES—Continued

Page(s)

Performance Guidelines for Criminal Defense Representation (Nat'l Legal Aid & Defender Ass'n 1995)

Guideline 4.1(a) 7, 17

Guideline 4.1(b) 9

Guideline 4.1(b)(2) 9

Guideline 4.1(b)(3) 10

Representation Regarding Guilty Plea, 9 Fed. Proc. L. Ed. (2013) 13

Rogosheske, Hon. Walter F., Minnesota Supreme Court, Proceedings at the National Judicial Conference on Standards for the Administration of Criminal Justice, *in* 57 F.R.D. 229 (1972) 18

Smith, Abbe, *The Lawyer's "Conscience" and the Limits of Persuasion*, 36 Hofstra L. Rev. 479 (2007) 17

State Bar of Tex., *Performance Guidelines for Non-Capital Criminal Def. Representation*, 74 Tex. Bar J. 616 (July 2011) 18

TABLE OF AUTHORITIES—Continued

Page(s)

The Shawshank Redemption
(Castle Rock Entertainment 1994) 16

Uphoff, Rodney J.,
The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach,
2 Clinical L. Rev. 73 (1995) 17

Yermish, Steven N.,
Ethical Issues in Indigent Defense,
33 Champion 22 (2009).....17

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association representing at the national level more than 40,000 attorneys, including public defenders and private criminal defense lawyers. NACDL's core mission is to ensure justice and due process for persons accused of crime; foster the integrity, independence, and expertise of the criminal defense profession; and promote the proper and fair administration of criminal justice. NACDL often files *amicus* briefs in this Court, seeking to provide guidance in cases presenting issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. NACDL is particularly interested in defending liberties guaranteed to criminal defendants by our Constitution and in ensuring that legal proceedings are handled fairly and properly.

INTRODUCTION AND SUMMARY OF ARGUMENT

Strickland v. Washington established a two-part test for evaluating ineffective assistance of counsel claims under the Sixth Amendment: "First, the defendant must show that counsel's performance was deficient"—*i.e.*, that it "fell below an objective stand-

---

[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amicus* and its counsel contributed monetarily to its preparation or submission. The parties have consented to the timely filing of any *amicus* briefs in this case, and copies of their letters of consent have been lodged with the Clerk of the Court.

ard of reasonableness . . . under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). "Second, the defendant must show that the deficient performance prejudiced the defense"—*i.e.*, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687, 694. This Court has made clear that "the negotiation of a plea bargain is a critical phase of litigation," such that a defendant is "entitled to 'the effective assistance of competent counsel'" in "deciding whether to plead guilty," *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480–81, 1486 (2010) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)), or instead to reject a plea offer and proceed to trial, *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012). In particular, "an accused is entitled to rely upon his counsel [1] to make an independent examination of the facts, circumstances, pleadings and laws involved and then [2] to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948).

Yet under the state court's and Petitioner's proposed stated-belief-in-innocence exception to *Strickland*, an attorney's abject failure to investigate the facts and law, and to render objective, informed advice at the plea stage, can *never* constitute ineffective assistance so long as his client has uttered the words, "I am innocent." *See* Pet'r Br. 31 ("'When a defendant proclaims his innocence, . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty—*no matter how 'good' the deal may be*.'" (emphasis added) (quoting the Michigan Court of Appeals)). Thus, Petitioner asks rhetorically, *id.* at 19 (quoting the district court): "[H]ow can a criminal defendant's counsel be ineffective for advising her to go to trial when she . . .

claims to be innocent of the crime?" The answer is simple: the stated-belief-in-innocence exception is wholly at odds with counsel's well-established Sixth Amendment duty to conduct an independent examination of the facts and law, and to offer an informed opinion on what course of action is in the client's best interests. The exception is also incompatible with this Court's frequent exhortation to evaluate attorney performance in a manner that is "case-by-case," *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (internal quotation omitted), "circumstance-specific," *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000), and "context-dependent," *Wiggins v. Smith*, 539 U.S. 510, 523 (2003), and with the Court's repeated rejection of bright-line rules "categorically remov[ing]" advice on certain topics "from the ambit of the Sixth Amendment right to counsel," *Padilla*, 130 S. Ct. at 1482; *accord, e.g.*, *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986) (refusing to carve out category of advice from ineffectiveness review).[2]

"[P]revailing professional norms," *Strickland*, 466 U.S. at 688, give concrete guidance on the contours of counsel's plea-stage duties. Before rendering advice, a competent attorney must, at a minimum, review the basic case documents, have a substantive discussion with his client about the facts, and follow up leads that these initial steps produce, including

---

[2] As explained in Respondent's Brief ("Resp't Br.") 18–25, it was unreasonable for the state court to determine that a claim of innocence by Respondent was the impetus for her plea withdrawal. This brief goes on to explain why the Sixth Circuit should be affirmed even if Respondent did tell her new attorney, Toca, that she believed she was innocent.

by interviewing key witnesses and speaking with prior counsel. *See infra* 7–11. Counsel's duties to investigate and to advise go hand-in-hand. Criminal defendants are entitled to the guidance of informed counsel when making the critical decision whether to plead guilty or proceed to trial. The attorney must ensure that his client understands the charges against her, explain the possible sentencing ranges if convicted at trial versus after a guilty plea, and offer his informed opinion as to the plea that should be maintained, in light of the objective evidence mustered by the state and the likely outcome at trial. *See infra* 11–16.

A stated-belief-in-innocence exception would be anathema to these duties: Without a basic investigation, counsel cannot properly evaluate the advantages and disadvantages of a plea offer; and absent counsel's informed advice, neither can the defendant. That is why the criminal defense attorney is required to fulfill his duties of investigation and advice regardless of whether the client professes either guilt or innocence, as authorities of numerous stripes make clear. *See infra* 16–19. A defendant often needs counsel's advice to understand, among other things, whether the facts as a whole make her guilty of a particular crime. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). As such, a defense attorney cannot view a statement of belief in innocence as a client's knowing and informed final decision. Moreover, a properly counseled defendant might rationally decide that a guilty plea is the best path forward where, for example, "the State's case against him [i]s so strong that he w[ill] . . . be[] convicted anyway" by the jury. *Henderson v. Morgan*, 426 U.S. 637, 648 n.1 (1976) (White, J., concurring). If the defendant "must be permitted to judge for himself in

this respect," *North Carolina v. Alford*, 400 U.S. 25, 33 (1970) (internal quotation omitted), that judgment needs to be informed by the advice of competent counsel. *See infra* 19–23.

Strickland's second prong addresses prejudice. It can be satisfied in a negotiated-plea context if "but for the ineffective advice of counsel there is a reasonable probability that . . . [the defendant] would have accepted the plea." *Cooper*, 132 S. Ct. at 1385. The Court has not, however, "resolved what, if anything, a petitioner must show in addition to [her] own credible post hoc testimony" to demonstrate prejudice. *Merzbacher v. Shearin*, 706 F.3d 356, 366 (4th Cir. 2013), *petition for cert. filed*, __ U.S.L.W. ___ (U.S. Apr. 25, 2013) (No. 12-9952).

Consistent with the "case-by-case prejudice inquiry that has always been built into the *Strickland* test," *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993), the fact-finding court must determine in each particular case, in light of all available evidence, whether the defendant has demonstrated a "reasonable probability" that she would have accepted the plea but for deficient counsel. *See infra* 24–29. In most meritorious Sixth Amendment violation cases—including this one—there will be corroborating evidence of prejudice. But the Court should not manufacture a new *per se* rule that carves out the rare case in which a defendant's testimony, standing alone, may be sufficiently credible to establish prejudice. Other legal tests, including *Strickland*'s performance prong, also place the bar out of reach for all but a few, *Padilla*, 130 S. Ct. at 1485, yet the Court has not used deterrence of weak claims as a ground to artificially close off relief to an entire category of potentially worthy ones. *See infra* 29–33.

ARGUMENT

I. THE PROPOSED "STATED-BELIEF-IN-INNOCENCE" EXCEPTION ON WHICH THE STATE'S ARGUMENT RESTS WOULD BE INCONSISTENT WITH THE ROLE OF COUNSEL IN OUR LEGAL SYSTEM, AND WITH THIS COURT'S DECISIONS CLEARLY ESTABLISHING AN ATTORNEY'S SIXTH AMENDMENT DUTY TO PROVIDE EFFECTIVE ASSISTANCE AT THE PLEA STAGE.

According to the State, so long as a defendant has asserted her innocence, her attorney is categorically relieved of any obligation to conduct a factual investigation or render informed advice on the advisability of accepting or maintaining a plea. That position runs directly counter to *Strickland* and its progeny, which are built on the fundamental notion that "defendants cannot be presumed to make critical decisions without counsel's advice," *Cooper*, 132 S. Ct. at 1385.

Defendants—even "intelligent and educated" ones—"require[] the guiding hand of counsel at every step in the proceedings," *Powell*, 287 U.S. at 69, "lest [they] be the victim of overzealous prosecutors, of the law's complexity, or of [their] own ignorance or bewilderment." *Williams v. Kaiser*, 323 U.S. 471, 476 (1945). An attorney's bedrock obligation to "serve as the accused's counselor and advocate," ABA Standards for Criminal Justice: Prosecution and Defense Function 4-1.2(b) (3d ed. 1993) [hereinafter ABA Standards], manifests at the plea stage in two specific duties. First, counsel has a duty to conduct a thorough, "independent" investigation of the "facts, circumstances, pleadings and laws involved" before rendering advice. *Von Moltke*, 332 U.S. at 721; *infra*

7–11. Second, he has a duty to provide his objective, "informed opinion as to what plea should be entered," *Von Moltke*, 332 U.S. at 721, based on the advantages and disadvantages of the plea offer, the risks involved in trial, and his factual and legal research, *infra* 11–16. A client making the final decision whether to plead guilty or proceed to trial can only "intelligent[ly] assess[] . . . the relative advantages" of her options with the informed "assistance of an attorney." *Brady v. United States*, 397 U.S. 742, 748 n.6 (1970). Therefore, counsel is not freed of his plea-stage Sixth Amendment duties by a client's stated belief in her innocence. *Infra* 16–23.

A. Criminal Defense Attorneys Have a Duty to Conduct a Thorough, Independent Factual Investigation, in Order to Properly Evaluate the Strengths and Weaknesses of the Case.

1. Counsel's duty to investigate is paramount, as "[t]he lawyer who is ignorant of the facts of the case cannot serve the client effectively." ABA Standards 4-3.2 cmt., at 152; *see also United States v. Nixon*, 418 U.S. 683, 709 (1974) ("The need to develop all relevant facts in the adversary system is both fundamental and comprehensive."). Defense counsel thus "has a duty to conduct an independent investigation . . . as promptly as possible," Performance Guidelines for Criminal Defense Representation 4.1(a) (Nat'l Legal Aid & Defender Ass'n 1995) [hereinafter NLADA Guidelines], in which counsel must "explore all avenues leading to [the] facts relevant to the merits of the case and the penalty in the event of conviction," ABA Standards 4-4.1(a); *see also Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make

reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Counsel's duty to investigate extends both to "'matters of fact'" and "'points of law.'" *Faretta v. California*, 422 U.S. 806, 827 n.35 (1975) (quoting 2 Z. Swift, *A System of Laws of the State of Connecticut* 398–99 (1796)).

Investigation at the plea stage is critical. "[W]ithout adequate investigation the lawyer is not in a position . . . to conduct plea discussions effectively[,]" ABA Standards 4-4.1 cmt., at 183, for example, by pointing out holes in the state's theory, or by highlighting exculpatory evidence, *Rompilla v. Beard*, 545 U.S. 374, 385–86 (2005). Moreover, counsel cannot render informed advice if he is himself uninformed. *Cf.* ABA Standards for Criminal Justice: Pleas of Guilty 14-3.2 (3d ed. 1999) [hereinafter ABA Pleas of Guilty] ("Defense counsel should not recommend . . . acceptance of a plea unless appropriate investigation . . . has been completed."). Without the facts, counsel cannot properly evaluate the advisability of the plea offer and the risks of proceeding to trial.

This Court has often reaffirmed the critical importance of the duty to investigate, finding counsel ineffective for failing to conduct a sufficient factual investigation. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 38–40 (2009) (per curiam); *Wiggins*, 539 U.S. at 521–22; *see also Michigan v. Harvey*, 494 U.S. 344, 348 (1990) (explaining that the "essence" of the right to counsel "is the opportunity for a defendant to consult with an attorney and to have him investigate the case"). The adversarial process simply "[can]not function properly unless defense counsel has done some investigation into the prosecution's case and

into various defense strategies." *Kimmelman*, 477 U.S. at 384–85.

2. Counsel must take concrete steps to satisfy the duty to investigate at the plea stage.

Counsel must—of course—obtain and review the basic case documents, including the charging documents, the state's evidence, and other readily available materials. *See, e.g.*, *Porter*, 558 U.S. at 39–40 (finding counsel's performance deficient in part because he "did not even take the first step of . . . requesting records" prior to a post-conviction hearing); ABA Standards 4-4.1(a) ("[Counsel's] investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities."); NLADA Guidelines 4.1(b) (counsel must "obtain[] and examine[]" any "charging documents"). These documents are critical "to learn what the [state] kn[o]w[s] about the crime, to discover any mitigating evidence . . . , and to anticipate the details . . . the [state] w[ill] emphasize." *Rompilla*, 545 U.S. at 385–86.

Counsel should also "conduct[] an in-depth interview of the client," which "should be used to: (A) seek information concerning the incident or events giving rise to the charge(s) . . .[;] (B) explore the existence of other potential sources of information relating to the offense[; and] (C) collect information relevant to sentencing." NLADA Guidelines 4.1(b)(2); *accord, e.g.*, ABA Standards 4-3.2(a).

Finally, counsel must "pursu[e] th[o]se leads" and take any additional investigative steps that a competent attorney would take based on "the quantum of evidence" known to counsel. *Wiggins*, 539 U.S. at 525, 527; *see also, e.g.*, ABA Standards 4-4.1(a) ("Defense counsel should . . . explore all ave-

nues leading to facts relevant to . . . the penalty in the event of conviction."). In particular, "[c]ounsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused," NLADA Guidelines 4.1(b)(3), as well as prior counsel. *Cf. Porter*, 558 U.S. at 39 (criticizing counsel because he "did not even take the first step of interviewing witnesses"). Thus, in *Wiggins*, although "counsel's investigation" drew from several sources, it "fell short of . . professional standards" because counsel did not "investigate[] further" based on "what counsel actually discovered" in the records. 539 U.S. at 523–25.[3]

3. This case illustrates why the duty to investigate is vital at the plea stage, and why a stated-belief-in-innocence exception would be incompatible with the role of competent counsel. The inculpatory evidence "revealed" at trial was not substantively different than what Toca would have discovered had he conducted a basic factual investigation—namely, picking up and reading the case file, conducting an in-depth interview of Ms. Titlow, and talking with prior counsel. *See* Resp't Br. 30. This evidence included Ms. Titlow's tape-recorded admission that she poured alcohol down the victim's throat and held his nose, her confession to police, "hush money" payments to the defendant, and the medical examiner's conclusions, *see id.*; Pet'r Br. 6–9; J.A. 44. No rea-

---

[3] The Court's discussion of failure-to-investigate violations at the "sentencing" stage are pertinent here because "the same . . . standard" is "applicable to ineffective-assistance claims arising out of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 57 (1985).

sonably competent attorney could have properly advised the defendant on the risks of abandoning a manslaughter plea without assessing these readily available materials, which easily created a reasonable risk of conviction for aiding and abetting murder. But under the State's proposed rule, counsel had *no* obligation to educate himself about the relevant facts, and he acted entirely reasonably in affirmatively "advising [his client] to go to trial" from a state of abject ignorance, because his client "claim[ed] to be innocent." Pet'r Br. 19. This cannot be: An attorney has a duty to assist a client who is stumbling blindly towards the edge of an abyss, and counsel who blinds *himself* to that readily ascertainable hazard is doubly at fault. "Such a complete lack of pretrial preparation puts at risk both the defendant's right to an 'ample opportunity to meet the case of the prosecution,' . . . and the reliability of the adversarial testing process," *Kimmelman*, 477 U.S. at 385 (quoting *Strickland*, 466 U.S. at 685), and clearly constitutes ineffective assistance of counsel, *id.*

B. Criminal Defense Attorneys Have a Duty to Provide Objective, Informed Advice on the Law, the Facts, and the Realistic Risks of Going to Trial, So That the Client Can Understand the Charges and the Evidence and Intelligently Evaluate Her Plea Options.

1. The State's proposed *Strickland* exception is also incompatible with counsel's well-established duty to provide objective, affirmative advice at the plea stage, *Padilla*, 130 S. Ct. at 1485, including "his informed opinion as to what plea should be entered," *Von Moltke*, 332 U.S. at 721; *see also Libretti v. Unit-*

ed States, 516 U.S. 29, 50 (1995) ("[I]t is [generally] the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement."). The attorney "must actually and substantially assist his client in deciding whether to plead guilty," *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974), with advice that suffices to permit the defendant to make an "informed and conscious choice" to accept or reject the offer, *Colson v. Smith*, 438 F.2d 1075, 1079 (5th Cir. 1971). This is because an intelligent plea is "the culmination of a rational decision-making process, in which the accused assesses the numerous factors which bear upon his choice of whether to formally admit his guilt or to put the State to its proof," *United States ex rel Healey v. Cannon*, 553 F.2d 1052, 1056 (7th Cir. 1977), and because "an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney," *Brady*, 397 U.S. at 748 n.6.[4]

2. To advise properly on whether to follow through on a plea offer—whether with respect to its acceptance, rejection, or withdrawal—an attorney must follow certain minimum steps.

First, counsel must "ensure that the defendant fully understands the plea that is being offered, including all terms of the sentence that could be imposed and other ramifications of that plea." ABA

---

[4] *See also Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) ("Only the presence of counsel could have enabled th[e] accused to . . . plead intelligently."). An unintelligent plea undermines the Fifth Amendment's Due Process guarantee. *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

Pleas of Guilty 14-3.2 cmt., at 120. The attorney thus provides straightforward *information* about the potential consequences of the charges the defendant is asked to accept in pleading guilty and those available at trial if the plea is rejected or withdrawn.

Second, counsel must give an "appraisal of the *likelihood* of conviction or acquittal . . . and advise the defendant, when that is possible, what sentence is likely." ABA Standards 4-5.1 cmt., at 198 (emphasis added). The attorney should not only convey basic information on the potential consequences ("you face a and b charges, which have maximum and minimum sentences of x and y"), but also "must actually and substantially assist the client . . . by providing the accused with an understanding of the law in relation to the facts," *Representation Regarding Guilty Plea*, 9 Fed. Proc. L. Ed. § 22:695 (2013), including information on "the probable sentence . . . after trial," and "a realistic appraisal of the value of any concessions offered by the prosecutor," ABA Pleas of Guilty 14-3.2(b) cmt., at 122. The defendant should expect that counsel will "explain[] the elements necessary for the government to secure a conviction [and] discuss the evidence as it bears on those elements," in order to give the defendant an accurate view of the likely outcome at trial. *Smith v. United States*, 348 F. 3d 545, 553 (6th Cir. 2003). Moreover, the attorney should "address considerations [he or the defendant] deem[] important . . . in reaching a decision" to account for the defendant's priorities and particular circumstances. ABA Pleas of Guilty 14-3.2(b).

Finally—and most critically—"an accused is entitled to rely upon his counsel to . . . offer his *informed opinion* as to what plea should be entered." *Von*

Moltke, 332 U.S. at 721 (emphasis added); *Williams*, 323 U.S. at 475–76 ("Only counsel [can] discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate."). Thus, "a defense lawyer in a criminal case has the duty to advise his client fully" not only on the parameters of the offer and likely consequences, but also "on whether a particular plea to a charge appears to be desirable" in the attorney's professional opinion. ABA Code of Prof'l Responsibility EC 7-7 (1992); *see also* ABA Pleas of Guilty 14-3.2 cmt., at 117 ("[T]he system relies, at heart, on defense counsel to ensure that a defendant's guilty plea is . . . entered in . . . her best interests."). In other words, "it is not the role of counsel merely to acquiesce in such a decision made independently by his client; *it is the role of counsel to counsel*." 5 Wayne R. LaFave et al., *Criminal Procedure* § 21.3(b) (West 2012) (emphasis added) (quoting *Gallarelli v. United States*, 441 F.2d 1402, 1404 (3d Cir. 1971)). "Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'" *Padilla*, 130 S. Ct. at 1483 (quoting *Libretti*, 516 U.S. at 50–51); *accord id.* at 1494 (Alito, J., concurring).

3. The contrary rule espoused by the Michigan Court of Appeals and the State—that "'[w]hen a defendant proclaims his innocence, . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty—*no matter how 'good' the deal may be*,'" Pet'r Br. 31 (citation omitted and emphasis added)—could not be more incompatible with counsel's "critical obligation" to "advise the client of the advantages and disadvantages of [the] plea," *Padilla*, 130 S. Ct. at 1483

(quotation marks omitted), and to then "offer his informed opinion" as to what course of action the client should take, *Von Moltke*, 332 U.S. at 721. The State would emasculate counsel's duty to render objective advice about the benefits, risks, and advisability of the plea, offering in its place a rule that categorically authorizes counsel to recommend a particular course of action—withdrawal of a negotiated plea—without investigating, considering, or conveying to his client whether that course of action is in her best interests.

This case well illustrates why informed, circumstance-specific advice on plea withdrawal is essential to the effective assistance of counsel under the Sixth Amendment. After Respondent's original lawyer negotiated a favorable plea agreement, Toca took over and—without the basic precaution of educating himself on the advantages and disadvantages of undoing what the first lawyer had achieved—led his client down a misguided path to a much worse position. That Respondent "voluntarily entered a guilty plea on the advice of counsel" does not absolve Toca of his deficient performance at the next critical stage (plea withdrawal), for it is "equally essential that the attorney advise a defendant of possible consequences" before "the defendant withdraws [the] negotiated plea." *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981). Like a new doctor who discontinues the original physician's prescribed course of treatment based solely on his patient's lay self-diagnosis, Toca had a duty to become independently knowledgeable about—and to advise his client of—the risks of reversing what the first professional had accomplished. This is consistent with Toca's *continuing* duty to render effective assistance at each critical stage—including plea withdrawal, *id.*; *Cooper*, 132 S. Ct. at 1385—in response to the dynamics of the case.

C. Authorities of Numerous Stripes—Including Leading Scholars and Practitioners, National Criminal Defense Organizations, Authoritative Treatises, the ABA, and State and Local Public Defender Offices—Universally Require Counsel to Fulfill the Duties of Investigation and Advice Regardless of Whether the Client has Expressed Her Belief that She Is Either Innocent or Guilty.

1. Because informed advice of counsel is critical to a defendant's intelligent evaluation of her plea-stage options, it would make no sense to relieve an attorney of his duties of investigation and advice simply because his client expresses, during an initial conversation, that she believes she should be acquitted. This stated-belief-in-innocence exception would have the perverse result of depriving many defendants of their right to meaningful advice when they need it most. That outcome would be especially pernicious given the "reality that criminal justice today is for the most part a system of pleas," *Cooper*, 132 S. Ct. at 1381, in which "many if not most defendants are initially reluctant to admit guilt," Stephanos Bibas, *Harmonizing Substantive Criminal Law Values & Criminal Procedure: The Case of Alford & Nolo Contendere Pleas*, 88 Cornell L. Rev. 1361, 1377 (2003); *cf.* The Shawshank Redemption at 26:51 (Castle Rock Entertainment 1994) ("Everybody in here is innocent. Didn't you know that?"). This Court has rejected similar attempts to incentivize attorney silence in the Sixth Amendment context, *Padilla*, 130 S. Ct. at 1483, and should do so again here.

2. Given the serious flaws in a stated-belief-in-innocence exception to *Strickland*, it is not surprising that authorities of numerous stripes have rejected the notion that an attorney is relieved of his plea stage duties by his client's expressed belief in either her innocence or guilt—including leading scholars and practitioners,[5] national criminal defense organizations and national judicial conferences,[6] authorita-

---

[5] *See, e.g.*, Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L.J. 1179, 1296–97 (1975) ("Whether the defendant denies his guilt . . . should not be determinative."); Robert P. Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 Santa Clara L. Rev. 1, 6 (2010) (advising defense counsel not to take at face value the statement "I didn't do it; I am innocent"); Abbe Smith, *The Lawyer's "Conscience" and the Limits of Persuasion*, 36 Hofstra L. Rev. 479, 496 (2007) ("If refusing a plea would be destructive, lawyers should employ the same degree of persuasion [in advising acceptance of the plea] with an avowedly innocent client as with an admittedly guilty one."); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 Clinical L. Rev. 73 (1995) ("[I]t would be very poor lawyering to simply permit a client to proceed to trial on a hopeless case without trying to convince that client to consider plea bargaining.").

[6] *See* Steven N. Yermish, *Ethical Issues in Indigent Defense*, 33 Champion 22, 25 (2009) (published by *amicus curiae* NACDL) (discussing counsel's "responsibility" to "advise a client to plead guilty" if the case is "'hopeless,' based on the evidence"); NLADA Guidelines 4.1(a) ("Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt."); Hon. Walter F. Rogosheske, Minnesota Supreme Court, Proceedings at the National Judicial Conference on Standards for the Administration of Criminal Justice, *in* 57 F.R.D. 229,

[Footnote continued on next page]

tive treatises,[7] the American Bar Association,[8] and state and local public defender offices.[9] This Court,

---

[Footnote continued from previous page]
366 (1972) ("No matter what the defendant tells his lawyer, he must investigate every aspect of the case.").

[7] *See, e.g.*, 1 Anthony G. Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases* § 215, at 363 (5th ed. 1988) (discussing counsel's duty to advise at the plea stage when the client "asserts that s/he is innocent"); LaFave, *supra*, § 21.3(b) ("[D]efense counsel should not be barred from recommending the negotiated plea route merely because the defendant . . . cannot bring himself to acknowledge his guilt.").

[8] ABA Standards 4-4.1(a) ("The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty."); *see also* Laurence A. Benner, *Expanding the Right to Effective Counsel at Plea Bargaining: Opening Pandora's Box?*, 27 Crim. Just. 4, 8–9 (2012) (published by the ABA) (citing ABA Standards 4-4.1(a) in rejecting notion that "defense counsel is absolved of the responsibility to conduct a reasonable factual investigation because the defendant has agreed to plead guilty").

[9] *See, e.g.*, Ariz. Pub. Defender Ass'n Performance Standards for Indigent Def. Counsel V.A (June 2006) (mirroring language of ABA Standards 4-4.1(a) and NLADA Performance Guidelines 4.1(a)); Gwinnett Judicial Circuit, State of Ga., Indigent Def. Program 4.1 (Jan. 2011) (same); Office of the State Pub. Defender, Standards for Counsel Representing Individuals Pursuant to the Mont. Pub. Defender Act VI.6.A (Dec. 2012) (same); N.D. Comm'n on Legal Counsel for Indigents, Performance Standards, Criminal Matters 7.1 (undated) (same); ADKT No. 411, Ex. A, at 26 (Nev. Jan. 4, 2008) (same); State Bar of Tex., *Performance Guidelines for Non-Capital Criminal Def. Representation*, 74 Tex. Bar J. 616, 624 (July 2011) (same); Commonwealth of Va., Standards of Practice for Indigent Counsel 4.1 (Mar. 15, 2012) (same); La. Admin. Code tit. 22, § 717(A) (2013) (same).

too, has made clear in related contexts that an attorney is not relieved of his Sixth Amendment duties simply because his client has communicated her desired course of action (or inaction) to him,[10] and the circuit courts have recognized this as the prevailing professional norm in the exact scenario now before the Court.[11] The reasons are clear.

First, the defendant cannot possibly understand the charges, and how her conduct will be judged against their elements, without the advice of counsel. *Von Moltke*, 332 U.S. at 721 ("Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman."); *Powell*, 287 U.S. at 69 ("[A lay-

---

[10] *See, e.g.*, *Porter*, 558 U.S. at 40 ("Porter may have been fatalistic or uncooperative, but that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation."); *Rompilla*, 545 U.S. at 377 ("[E]ven when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on.").

[11] *See, e.g.*, *Boria v. Keane*, 99 F.3d 492, 497 (2d Cir. 1996) ("[I]t would be impossible to imagine a clearer case of a lawyer depriving a client of constitutionally required advice" than for counsel to fail to give his "professional advice" on the decision whether to plead simply because defendant "profess[ed] innocence."); *Smith*, 348 F.3d at 552–54 (holding defendant's protestations of innocence did not justify attorney's failure to adequately advise as to the advantages of accepting the plea offer in the face of "overwhelming" evidence against the client); *see also Silva v. Woodford*, 279 F.3d 825, 840 (9th Cir. 2002) ("[A] lawyer's duty to investigate is virtually absolute, regardless of a client's expressed wishes.").

man] is incapable, generally, of determining for himself whether the indictment is good or bad."). As such, counsel must allow for the possibility that the client's statement of innocence is misguided, especially if he knows the client has already admitted guilt in open court upon advice of counsel.

For example, the defendant might say "I am innocent" out of an erroneous belief that because she was not the person who had her hands on the victim when he finally succumbed, she is relieved of criminal liability, even though the state's evidence easily supports charges of manslaughter or aiding and abetting murder. Indeed, in some states—Michigan, for example—the definition of murder and manslaughter are found "at common law," rather than in a statute, *People v. Townes*, 218 N.W.2d 136, 140 (Mich. 1974) (manslaughter); *People v. Wilder*, 308 N.W.2d 112 (Mich. 1981), *overruled on other grounds by People v. Ream*, 981 Mich. 223, 242 (Mich. 2008) (murder), making it especially difficult for a layman to determine which crimes she could be found guilty of. Thus, a defendant might "assert[] his legal innocence" even though his "factual contentions, when accepted as true, make out no legally cognizable defense to the charges." *United States v. Barker*, 514 F.2d 208, 220 (D.C. Cir. 1975). In such a case, it would be anathema to the obligations of counsel for him to look on quietly (and ignorantly) as his client chooses to cancel a favorable plea offer on the mistaken impression that the facts show she is innocent.

Second, even assuming the defendant understands the legal and factual threshold for the charges and truly "believe[s] himself to be innocent," it might nevertheless be in the defendant's best interests to

plead guilty, because "the State's case against him [i]s so strong that he w[ill] . . . be[] convicted anyway." *Henderson*, 426 U.S. at 648 n.1 (White, J., concurring); *see also Alford*, 400 U.S. at 37–38 (permitting defendant to enter a guilty plea "because in his view he had absolutely nothing to gain by a trial and much to gain by pleading," in light of the state's "strong case"). And the defendant might rationally decide that a guilty plea is in his best interests for other valid reasons: The defendant might, for example, "make[] a conscious choice to plead simply to avoid the expenses or vicissitudes of trial," *United States v. Vonn*, 535 U.S. 55, 69 n.8 (2002); "to have some control over the next steps and . . . certainty over the outcome of [her] case," Anne D. Gooch, Note, *Admitting Guilt by Professing Innocence: When Sentence Enhancements Based on Alford Pleas Are Unconstitutional*, 63 Vand. L. Rev. 1755, 1763 (2010); or "to avoid worse outcomes at trial," Bibas, *supra*, at 1373. Whether in the context of an *Alford* plea, or otherwise,[12] if there is a "factual basis for the plea," *Alford*, 400 U.S. at 38 n.10, the defendant should not be denied "the opportunity to act in his own best interest [in pleading guilty], *as advised by his trial*

---

[12] *See, e.g.*, *Brady*, 397 U.S. at 751 (noting "the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged"); *see also Blackledge v. Allison*, 431 U.S. 63, 72 (1977) (listing "finality" as a "chief virtue[] of the plea system"); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969, 1975 (1992) (plea bargaining provides defendants with finality and certainty).

counsel," *United States v. Gaskins*, 485 F.2d 1046, 1049 (D.C. Cir. 1973) (emphasis added). Indeed, this Court has made clear that the defendant "must be permitted to judge for himself in this respect." *Alford*, 400 U.S. at 33 (internal quotation marks omitted).

Third, wary of "acknowledg[ing] guilt," even defendants who ultimately provide a factual basis for a guilty plea frequently assert their innocence at an earlier stage in the proceedings—including "to their lawyers." Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2502 (2004); *see also* Paul G. Cassell, *Some Skeptical Observations On the Proposed New "Innocence" Procedures*, 56 N.Y.L. Sch. L. Rev. 1063, 1070 (2011) ("[M]ost of the defendants who have already denied their involvement in the crime to the police would feel comfortable denying their involvement to their defense attorney."). Such assertions do not relieve the attorney of his duty to counsel effectively, including by explaining the plea offer and the risks of trial, so his client can decide intelligently whether to admit guilt. Otherwise, many defendants would lose their constitutional right to informed plea-stage advice.

3. A world in which the stated-belief-in-innocence rule is the law would look a lot like the one the Second Circuit faced (and rejected) in *Boria*: Although defense counsel's opinion was that "his client's decision to reject the plea bargain was suicidal," because of the state's bulletproof case, he did not communicate that opinion to his client, and he "did nothing to persuade [his client] of the absurdity of a decision" to go to trial—all because his client had

"profess[ed] innocence," 99 F.3d at 495–96. The defendant rejected the plea offer, went to trial, and was convicted, resulting in a sentence of twenty years to life in prison, where the sentence would have been one to three years under the plea offer. *Id.* at 494–95. The court rightly held that "it would be impossible to imagine a clearer case of a lawyer depriving a client of constitutionally required advice." *Id.* at 497.

II. *STRICKLAND* ALLOWS COURTS TO FIND A REASONABLE PROBABILITY THAT A DEFENDANT WOULD HAVE PLEADED GUILTY BUT FOR DEFICIENT COUNSEL WHEN EITHER: (A) HER TESTIMONY TO THAT EFFECT IS BOLSTERED BY OBJECTIVE CORROBORATING EVIDENCE; OR (B) HER TESTIMONY IS INHERENTLY CREDIBLE.

Under *Strickland's* second prong, the defendant must, in the negotiated-plea context, establish that "but for the ineffective advice of counsel there is a reasonable probability that . . . [she] would have accepted the plea." *Cooper*, 132 S. Ct. at 1385.[13] The Court has not, however, "resolved what, if anything, a petitioner must show in addition to [her] own credible post hoc testimony" to demonstrate prejudice. *Merzbacher*, 706 F.3d at 366.

Consistent with the "case-by-case prejudice inquiry that has always been built into the *Strickland* test," *Lockhart*, 506 U.S. at 369 n.2, the fact-finding

---

[13] It is undisputed (Pet'r Br. 40) that Respondent satisfied *Cooper*'s remaining prejudice requirements, *see* 132 S. Ct. at 1385.

court should survey all available evidence in determining whether the defendant has demonstrated a "reasonable probability" that she would have followed through on the plea but for deficient counsel. *See infra* 24–25. In most cases—including this one—the totality of the circumstances will include corroborating evidence. *See infra* 26–29. But the State's speculation that no case could ever exist in which a defendant's testimony, standing alone, is credible enough to establish prejudice is scant reason to erect an arbitrary, *per se* bar to granting relief in the event the State is wrong. The only thing the proposed rule would accomplish is needless litigation over the line between "corroborated" and "standing alone." *See infra* 29–33.

A. There Is No Dispute that a Defendant May Demonstrate Prejudice by Identifying "Objective" Evidence that Corroborates Her Testimony, as Respondent Did in this Case.

1. There is no dispute in this case that courts, in deciding a claim of prejudice, "must consider the totality of the evidence," *Strickland*, 466 US. at 695, including all of "the factual circumstances surrounding the plea," *Miller v. Champion*, 262 F.3d 1066, 1072 (10th Cir. 2001), and that they may properly find prejudice where "objective" evidence corroborates the defendant's substantive testimony that she would have followed through on a guilty plea but for deficient counsel. *See* Pet'r Br. 41. Objective evidence has been held to include affidavits submitted by someone other than the defendant, *see, e.g.*, *Paters v. United States*, 159 F.3d 1043, 1047–48 & n.6 (7th Cir. 1998) (family, counsel, and government attor-

ney); *United States v. Day*, 969 F.2d 39, 45–46 (3d Cir. 1992) (counsel), government concessions, *Paters*, 159 F.3d at 1048 & n.6, consistency with the record, *cf. United States v. Morris*, 106 F. App'x 656, 659 (10th Cir. 2004) (proposed plea agreement contradicted the defendant's assertions); *Moses v. United States*, No. 97-3938, 1999 WL 195675, at *2 (8th Cir. 1999), prior willingness to plead (or lack thereof), *Missouri v. Frye*, 132 S. Ct. 1399, 1411 (2012) (prior willingness demonstrates that petitioner was amenable to pleading guilty when properly represented); *Johnson v. Duckworth*, 793 F.2d 898, 902 (7th Cir. 1986), the defendant's demeanor, *see Turner v. Tennessee*, 858 F.2d 1201, 1206 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989), *reinstated*, 726 F. Supp. 1113 (M.D. Tenn. 1989) (defendant "at all times appeared to be under [counsel's] control"), her reluctance to go to trial, *see Magana v. Hofbauer*, 263 F.3d 542, 552 (6th Cir. 2001), the strength of the state's case, *see Merzbacher*, 706 F.3d at 367, and a significant disparity between the sentence a defendant was offered and the sentence she receives, *United States v. Gordon*, 156 F.3d 376, 381 (2d Cir. 1998) ("[S]uch a disparity provides sufficient objective evidence . . . to support a finding of prejudice."); *Smith*, 348 F.3d at 552 (collecting cases).[14] The Solicitor General concedes as much. S.G. Br. 19–21.

---

[14] *But see Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991) (finding insufficient that the defendant "would have received a lesser sentence had he accepted the plea agreement").

2. The State claims that objective evidence of prejudice was absent here (Pet'r Br. 41), but what the State actually objects to is how the Sixth Circuit weighed the *quality* of that evidence under these particular facts (*id.* at 41–45). A disagreement over the quantum of objective evidence in a particular case is no reason to abandon *Strickland*'s "totality of the evidence" test, 466 U.S. at 695. A review of that evidence illustrates the point.

First, Ms. Titlow initially accepted a plea agreement on the record, *Titlow v. Burt*, 680 F.3d 577, 591 (6th Cir. 2012), which demonstrates that she was amenable to pleading guilty when properly represented. *Cf. Frye*, 132 S. Ct. at 1411 (defendant's acceptance of a later plea offer "indicated that he would have accepted the earlier . . . offer" had counsel apprised him of it). The State would bar *any* consideration of this corroborating evidence, arguing that Ms. Titlow's initial plea is irrelevant because she later withdrew it and maintained her innocence. *See* Pet'r Br. 40. But her guilty plea while represented by prior counsel, followed by a quick withdrawal through deficient counsel, supports her testimony that she *would have maintained her plea* had it not been for the ineffective assistance of the latter attorney. *Compare, e.g.*, *Lewandowski v. Makel*, 949 F.2d 884, 889 (6th Cir. 1991) (prejudice demonstrated where defendant accepted plea, and then withdrew it after receiving ineffective assistance), *with Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995) (defendant maintained his innocence before, during, and after trial and never asserted that he would have accepted a plea).

Second, Ms. Titlow's sentence "was nearly three times the punishment that she was offered under the plea agreement." *Titlow*, 680 F.3d at 591. This "substantial disparity between the penalty offered by the prosecution and the punishment called for by the indictment is sufficient to establish a reasonable probability that a properly informed and advised defendant would have accepted the prosecution's offer." *Dedvukovic v. Martin*, 36 F. App'x 795, 798 (6th Cir. 2002). The State, again, would give this evidence no weight, reasoning that, because *Cooper* always requires a disparity to demonstrate prejudice, such evidence cannot corroborate the defendant's testimony that she would have accepted the plea. Pet'r Br. 40. The State misses a critical point. Sentencing disparities play *two* important roles in the prejudice analysis: (1) they confirm that a defendant was deprived of a favorable outcome, *see Frye*, 132 S. Ct. at 1409 ("To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable."); and (2) they can be probative of whether she would have accepted the plea offer had she not been led astray, *cf. id.* at 1411 ("There appears to be a reasonable probability Frye would have accepted the prosecutor's original offer . . . because he pleaded guilty to a more serious charge."). These overlapping roles are not coextensive: Any amount of disparity may suffice to show the former, *id.* at 1409 ("Any amount of additional jail time has Sixth Amendment significance." (brackets, quotation marks, and cita-

tion omitted)), but only a disparity of sufficient degree to induce a plea—such as the disparity here—may show the latter.[15]

Third, the statements of Ms. Titlow's original and trial attorneys, and the prosecutor's own unguarded comments, corroborate Ms. Titlow's testimony that Toca's advice prompted her to reject the plea. *See* Resp't Br. 41; J.A. 300–01. The State does not respond to this significant evidence.

The State's quarrel with the weight given to these three categories of evidence is no excuse for categorically denying their probative value. Such evidence satisfies the prejudice standard accepted by all of the lower courts. Indeed, in *Cooper*, this Court found that the "[defendant] ha[d] shown . . . a reasonable probability [that] he . . . would have accepted the guilty plea" based on the very same types and quantity of corroborating evidence. *See* 132 S. Ct. at 1391 (citing *Lafler v. Cooper*, 376 Fed. App'x 563, 571–72 (6th Cir. 2010), which relied solely on "the significant disparity between the prison sentence under the plea offer and exposure after trial" and

---

[15] *Compare, e.g.*, *Raysor v. United States*, 647 F.3d 491, 495–96 (2d Cir. 2011) (requiring a "significant" or "substantial" disparity), *and Hofbauer*, 263 F.3d at 551 (noting a "large" disparity), *with, e.g.*, *United States v. Nigro*, 419 F. App'x 244, 247 n.7 (3d Cir. 2011) ("the relative disparity between potential sentences is not that apparent"). *Cf.* Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 Stan. L. Rev. 887, 895 (1980) ("The greater the defendant's desire for trial, the greater the sentencing disparity must be in order to induce a guilty plea.").

"confirm[ation]" from prior counsel that the defendant "was open to pleading guilty" as "independent corroboration" of the defendant's subjective testimony).

B. This Court Need Not Foreclose the Possibility of the Rare Case In Which a "Reasonable Probability" of Prejudice Is Satisfied by a Defendant's Credible Testimony.

1. Many circuits have held that a defendant *must* present corroborating evidence of the kinds discussed above to establish prejudice in the plea context. *See, e.g.*, *Paters*, 159 F.3d at 1047; *Gordon*, 156 F.3d at 381; *Engelen*, 68 F.3d at 241; *Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991). By contrast, the Sixth Circuit has stated that while objective evidence properly corroborates the defendant's testimony, a fact-finder may in the rare case determine, based on the credibility of defendant's testimony standing alone, that there is a reasonable probability that the defendant would have accepted the plea. *See, e.g.*, *Hofbauer*, 263 F.3d at 548.[16]

---

[16] In application, there is no daylight between the approach of the Sixth Circuit and its sister circuits, *see* Resp't Br. 37–39, because the Sixth Circuit in fact relies (as here) on objective evidence that corroborates the defendant's subjective testimony in finding a "reasonable probability" of prejudice. *See, e.g.*, *United States v. Morris*, 470 F.3d 596, 602–03 (6th Cir. 2006); *Smith*, 348 F.3d at 551; *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2003); *Hofbauer*, 263 F.3d at 547 n.1, 551–52; *Turner*, 858 F.2d at 1206; *Lewandowski*, 949 F.2d at 889; *Dedvukovic*, 36 F. App'x at 798. *Amicus* agrees with Respondent that this case does not present the question whether credi-

[Footnote continued on next page]

2. The Sixth Circuit's statement correctly aligns with this Court's Sixth Amendment jurisprudence, and with the discretion fact-finders have in all areas of law when assessing credibility. The decision below will not "open the floodgates" to frivolous litigation, because it is the rare claim in which the defendant's testimony is inherently credible despite the absence of any external evidence, and because courts do not need a *per se* rule to be able to dispose of meritless claims.

A "case-by-case prejudice inquiry . . . has always been built into the *Strickland* test." *Lockhart*, 506 U.S. at 369 n.2; *see also Strickland*, 466 U.S. at 692 (characterizing prejudice in most cases as a "case-by-case inquiry"); *id.* at 695–96 ("Some errors will have had a pervasive effect . . . and some will have had an isolated, trivial effect."). Thus, this Court has rejected "mechanical rules" for the "adjudicat[ion of] a claim of actual ineffectiveness of counsel." *Strickland*, 466 U.S. at 696.

An artificial restriction on the power of courts to give determinative weight to credible testimony would be particularly inappropriate here. First, the categories of available objective evidence are limited by the very nature of the inquiry. *See, e.g., Paters*, 159 F.3d at 1050 (Rovner, J., concurring) (noting the

---

[Footnote continued from previous page]
ble testimony alone is sufficient to show prejudice under *Cooper*. *See* Resp't Br. 35–37. If the Court nonetheless reaches that question, this Section II.B explains why it should reject the State's proposed *per se* rule.

"difficulty of producing so-called objective evidence in this context"); *Lewandowski*, 949 F.2d at 889 ("[T]he amount of objective evidence will quite understandably be sparse."). Often, the defendant's testimony may be the *only* direct evidence available as to what she would have done. *Cf.* Stephanos Bibas, Comment, *Incompetent Plea Bargaining & Extrajudicial Reforms*, 126 Harv. L. Rev. 150, 161 (2011) ("Few defendants have documentary or other evidence that their attorneys . . . gave them incorrect advice."). Thus, while some objective evidence will support the vast majority of valid prejudice claims, truly external evidence is uncommon, and should not be required.

Moreover, courts have no hesitation in relying on a defendant's "self-serving" statements to *deny* relief where those statements seem non-credible. *See, e.g.*, *United States v. Nigro*, 419 F. App'x 244, 248 (3d Cir. 2011). Likewise, courts have considered probative the *absence* of subjective statements that the defendant would have accepted a plea. *See, e.g.*, *Engelen*, 68 F.3d at 241; *Duckworth*, 793 F.2d at 902 n.3. A double-standard in which a defendant's statements can only be used against her is inconsistent with *Strickland's* instructions that, in determining prejudice, a court "must consider the totality of the evidence." 466 US. at 695.

The State's rule would also be inconsistent with courts' long-recognized expertise in determining whether a defendant is testifying credibly. *See, e.g.*, *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855–56 (1982) (trial judges have the "unique opportunity . . . to evaluate the credibility of witnesses and to weigh the evidence," and doing so is the "special province of the trier of fact"). Judges should have

"discretion to make those sorts of determinations under the facts of a particular case." *Paters*, 159 F.3d at 1050 (Rovner, J., concurring).

3. Nor is an "objective evidence" rule necessary to prevent a flood of frivolous claims. This Court has rejected "floodgate" concerns in analogous contexts. *See, e.g.*, *Cooper*, 132 S. Ct. at 1389–90. "Surmounting *Strickland*'s high bar is never an easy task." *Padilla*, 130 S. Ct. at 1485 (citing *Strickland*, 466 U.S. at 689). Thus, in most cases, the challenge is dismissed without even reaching the prejudice prong. And there is little incentive for either defendants or lawyers to try to "game" the system, as "incompetent lawyers risk disciplinary action, malpractice suits, and consequent loss of business," *Day*, 969 F.2d at 46 n.9, and "'[d]eliberate ineffective assistance of counsel is . . . usually bad strategy as well.'" *Griffin v. United States*, 330 F.3d 733, 739 (6th Cir. 2003) (quoting *Day*, 969 F.2d at 46 n.9).

Moreover, "[t]o the extent that petitioners and their trial counsel may jointly fabricate these claims . . . , the district courts will have ample opportunity to judge credibility at evidentiary hearings." *Day*, 969 F.2d at 46 n.9. Even absent foul play, "[i]f all the petitioner were to offer . . . was his own self-serving statement that he would have pled guilty . . . a district judge would certainly have the discretion to find such evidence insufficient under the facts of a given case." *Paters*, 159 F.3d at 1050 (Rovner, J., concurring). Indeed, because uncorroborated statements are necessarily less reliable, the defendant whose testimony is uncorroborated would, inherently, bear a heavier burden than one whose testimony was buttressed by corroborating evidence. This hurdle by

itself limits successful prejudice claims based solely on subjective testimony to only the most extraordinary cases. "There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit." *Padilla*, 130 S. Ct. at 1485.

On the other side of the ledger is confusion and needless litigation over when "subjective" testimony can be said to "stand alone." This case is a good example: Was there truly no objective evidence corroborating Ms. Titlow's testimony, or is the State really attacking the *weight* of that evidence? Forcing courts to split hairs in the mine run of cases in order to fend off the possibility that they might in rare cases be hoodwinked by self-serving testimony is hardly worth the bargain.

Finally, to the extent a court determined—as most would—that a defendant's testimony alone was *insufficient* to establish prejudice, such a finding would be difficult to challenge in habeas proceedings, 28 U.S.C. § 2254(d)(2) & (e)(1), or on appeal, *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985), protecting the finality of convictions.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted.

DAVID M. PORTER
Co-Chair,
Amicus Committee
NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE
LAWYERS
801 I Street, 3rd Fl.
Sacramento, CA 95814
(916) 498-5700

DAVID DEBOLD
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
ddebold@gibsondunn.com

AKIVA SHAPIRO
SETH ROKOSKY
SARAH KUSHNER
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

Counsel for Amicus Curiae

July 24, 2013